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IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,
v.
WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) were defendants in the district court and appellees in the court of appeals.

Respondents William Twombly and Lawrence Marcus, both individually and on behalf of all others similarly situated, were plaintiffs in the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) state the following:

Bell Atlantic Corporation. On June 30, 2000, GTE Corporation and Bell Atlantic Corporation merged, and Bell Atlantic Corporation subsequently changed its name to Verizon Communications Inc., its successor-in-interest. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

BellSouth Corporation. BellSouth has no parent company, and no publicly held company owns 10% or more of its stock.

Qwest Communications International Inc. Qwest Communications International Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. On November 18, 2005, SBC Communications Inc. ("SBC") merged with AT&T Corp. That same day, SBC changed its name to AT&T Inc. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Verizon Communications Inc. Verizon Communications Inc. is the successor-in-interest to Bell Atlantic Corporation. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-34a) is reported at 425 F.3d 99. The district court's opinion (Pet. App. 35a-58a) is reported at 313 F. Supp. 2d 174.

JURISDICTION

The court of appeals entered its judgment on October 3, 2005. A timely petition for rehearing was denied on January 3, 2006. Pet. App. 59a-60a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, is set forth at Pet. App. 61a.

PRELIMINARY STATEMENT

The Second Circuit has decided an important and recurring question regarding the standards for pleading a claim under Section 1 of the Sherman Act. The court held that a complaint can survive a motion to dismiss simply by alleging otherwise innocuous parallel conduct – conduct that would not support an inference of conspiracy under this Court's precedents – coupled with a bald assertion (but no supporting facts indicating) that such conduct is the result of a "conspiracy." That ruling conflicts with the decisions of other circuits, is inconsistent with this Court's precedent, and invites – by the Second Circuit's own admission – unmeritorious suits intended to extract settlement payments from defendants whose only alternative is to bear the "colossal expense of undergoing discovery." Pet. App. 30a.

Plaintiffs below are consumers, representatives of a purported class, who allege that incumbent telephone companies, acting in parallel: (1) resisted new entrants' efforts to enter their respective markets and (2) failed to compete in each others' territories as new entrants. Absent *agreement* by the defendant companies, the allegations fail to state a claim under Section 1 of the Sherman Act. Plaintiffs therefore added an allegation that the defendants conspired – though they do not say when (sometime in the last decade); they do not say where; they do not say who (the four defendants have nine major corporate predecessors and hundreds of thousands of employees); and they do not even say why (because the alleged conduct is perfectly explicable on grounds of self-interest, without any need for collusion).

The United States District Court for the Southern District of New York (Lynch, J.) dismissed, holding that the complaint could not proceed unless the behavior alleged, if ultimately proved, would support an inference of conspiracy under the legal standards established by this Court. Facts meeting the Sherman Act standards for inferring conspiracy are needed both to "show[] that the pleader is entitled to relief," Fed. R. Civ. P. 8(a); *see* Pet. App. 44a, and to give the defendants "some idea of how and why the defendants are alleged to have conspired," *id.* at 45a. Judge Lynch concluded that the parallel conduct alleged in this case failed to support any inference of conspiracy: all businesses are expected, acting on their own, to resist rivals' efforts to take their customers, and there is nothing remotely suspicious – *i.e.*, suggestive of concerted rather than independent action – about a firm's decision not to enter a new line of business, particularly one attended by the risks described in the complaint.

Because the Second Circuit "disagree[d] with the standard that the district court applied," *id.* at 3a, it reversed. It held, instead, that "allegations of parallel anticompetitive conduct" always suffice to state a claim of conspiracy under Section 1 unless "there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the

product of collusion rather than coincidence." *Id.* at 25a (emphasis added). It acknowledged that the "overall result" of its standard – which invites unfounded claims by dispensing with any requirement that a complaint plead facts that would suffice legally to show that collusion lay behind the parallel conduct – would place "a burden on the courts and [have] a deleterious effect on the manner in which and efficiency with which business is conducted." *Id.* at 30a. But it stated that only "Congress or the Supreme Court" could ameliorate the result. *Id.*

The Court should accept the Second Circuit's invitation. It should do so not only to resolve a split in the circuits, but also to make clear that, to survive a motion to dismiss, a Section 1 complaint must state a claim under substantive antitrust standards. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (reversing Second Circuit decision on motion to dismiss antitrust claim); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (same). Unless corrected, the decision will lead to mushrooming claims, imposing incalculable costs and distorting legitimate, unilateral business judgments.

STATEMENT OF THE CASE

1. The Complaint

In 1982, the AT&T divestiture decree created seven Regional Bell Operating Companies ("Bell companies") and assigned each of them to a different portion of the country. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). These seven Bell companies – predecessors of the four defendants – provided local telephone service pursuant to state-authorized exclusive franchise arrangements but were barred from offering long-distance service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 413-14 (1999) (Breyer, J., concurring in part and dissenting in part). The Telecommunications Act of 1996 (the "1996 Act") eliminated exclusive franchises and authorized new entry in local

telephone service markets. To jump-start entry without the need for duplication of all local network facilities, the 1996 Act required the incumbent local telephone companies to "unbundle" – that is, to share with new entrants at low, cost-based rates – certain elements of their local networks. *See Trinko*, 540 U.S. at 405-06. In return for opening their local markets to competition, the Bell companies were promised the opportunity – once they had fully complied with their market-opening obligations – to enter the long-distance business on a state-by-state basis. *See generally* 47 U.S.C. § 271. Between 1999 and 2003, after spending billions on regulatory compliance efforts, and having their market-opening efforts exhaustively scrutinized by the Department of Justice and by federal and state regulatory authorities, all the Bell companies eventually earned approval to offer long-distance service in their respective states.

In 2002, the Second Circuit ruled in *Trinko v. Verizon* that an alleged failure to comply with the network-sharing duties of the 1996 Act could be "exclusionary conduct" for purposes of Sherman Act Section 2. In the wake of that ruling, William Twombly sued SBC in the District of Connecticut, on behalf of a purported class, under Section 2. He claimed that 12 categories of conduct, all related to insufficient sharing by SBC, constituted anticompetitive conduct designed "to restrain, stifle and delay any meaningful competition for local telephone and/or high-speed internet services." Consol. Am. Class Action Compl. ¶ 30, *In re SBC Communications, Inc. Antitrust Litig.*, No. 3:02CV1617 (DJS) (D. Conn. filed Feb. 19, 2003). After this Court reversed the Second Circuit in *Trinko*, holding that claims of insufficient sharing are not actionable under Section 2, Twombly abandoned his complaint.

But Twombly's effort to add "new layer[s] of interminable litig ation" to implementation of the 1996 Act, *Trinko*, 540 U.S. at 414, was not limited to the Section 2 case he had brought in Connecticut. Joined by a second purported class representative, Twombly brought this separate class action complaint in the Southern District of New York, this time

under Section 1. The complaint alleges that "Defendants . . . have engaged and continue to engage in unanimity of action by committing one or more of the following wrongful acts in furtherance of a common anticompetitive objective to prevent competition . . . in their respective local telephone and/or high speed internet service markets"; the complaint then lists precisely the same 12 categories of conduct that provided the basis for Twombly's earlier complaint under Section 2. Am. Compl. ¶ 47. The complaint adds one more allegation: that defendants "have refrained from engaging in meaningful head-to-head competition in each other's markets." *Id.* ¶ 39.

Although plaintiffs allege that "Defendants and their co-conspirators engaged in a contract, combination or conspiracy," *id.* ¶ 64, the complaint makes clear that the sole basis for the allegation is the observed marketplace conduct of the defendants (and one newspaper quote attributed to one of the defendant's executives). Plaintiffs allege no facts directly indicating any agreement among the defendants. The complaint fails to allege when the agreement was reached, "the exact dates being unknown to Plaintiffs." *Id.* The complaint fails to identify which of the corporate predecessors of the four defendants participated in the conspiracy. Nor does it identify any of the "other persons, firms, corporations and associations" that also allegedly participated in the conspiracy. *Id.* ¶ 16. And, although the complaint alleges that defendants "communicate amongst themselves through a myriad of organizations," *id.* ¶ 46, it fails to identify a single occasion on which any relevant agreement was reached, the mechanism for enforcement of any such agreement, or any individual parties to any such understanding.

Instead, plaintiffs "allege *upon information and belief*," "[i]n the absence of any meaningful competition between the [defendants] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [new entrants]," that "Defendants have entered into a contract, combination or conspiracy." *Id.* ¶ 51 (emphasis added). Plaintiffs also include two types of allegations

intended to bolster their conjecture. First, plaintiffs argue that each defendant's failure to compete even where their respective territories abut or in some cases surround those of the other defendants "would be anomalous in the absence of an agreement." *Id.* ¶ 40. The complaint alleges that, in competing for business in such nearby areas, each defendant would have "substantial competitive advantages," *id.* ¶ 41, though the complaint says nothing about how any defendant could overcome the obstacles that incumbents have supposedly placed in the way of all new entrants. Moreover, plaintiffs allege, an executive of one of the defendants had commented that competing as a new entrant, or "CLEC,"[1] in the territory of one of the other defendants "might be a good way to turn a quick dollar but that doesn't make it right," *id.* ¶ 42, ignoring the same executive's statement, in the same article, that such entry is not a "sustainable economic model," *see infra* note 6.

Second, plaintiffs allege that defendants had both the ability and the incentive to conspire. The "structure of the market . . . is such as to make a market allocation agreement feasible" in that "[e]laborate communications . . . would not have been necessary in order to enable Defendants to agree to allocate territories" and "[i]f one of the Defendants had broken ranks and commenced competition in another's territory the others would quickly have discovered that fact." *Id.* ¶¶ 48, 49. Also, "[h]ad any one of the Defendants not sought to prevent CLECs . . . from competing effectively . . . the resulting greater competitive inroads into that Defendant's territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct" and "would have enhanced the likelihood that such a CLEC might present a

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[1] New entrants to local telephone markets, in the wake of the 1996 Act, are commonly known as "competitive local exchange carriers" or "CLECs." The incumbent local exchange carriers are known as "ILECs."

competitive threat in other Defendants' territories as well." *Id.* ¶ 50.

2. The District Court's Decision

The district court granted defendants' motion to dismiss for failure to state a claim. Judge Lynch began by noting that, "absent an agreement among competitors to restrain trade, anti-competitive behavior does not violate § 1." Pet. App. 40a. Accordingly, to establish their entitlement to relief under Federal Rule of Civil Procedure 8(a), plaintiffs must allege facts that, drawing all inferences in plaintiffs' favor, show the existence of such an agreement.

Noting the absence of direct factual allegations to support the existence of any actual agreement, Judge Lynch began his analysis by observing that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, 'bare bones' allegation of conspiracy" and "insufficient to withstand a motion to dismiss." *Id.* at 42a. The court, therefore, held that, "[i]n the context of parallel conduct claims, the basic requirement that plaintiffs must fulfill is to allege facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest." *Id.* at 46a. Such "plus factors include evidence that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id.* at 41a-42a. "[O]n a motion to dismiss[,] the Court may properly draw these background assumptions only from the facts pleaded in the complaint and the relevant statute, and may rely only on such background facts about the market and its history that are appropriate for judicial notice." *Id.* at 46a.

Plaintiffs failed to satisfy the applicable standard. With regard to plaintiffs' allegation that defendant ILECs conspired

to keep CLECs out of their individual markets, plaintiffs explicitly conceded that "it is in each ILEC's individual economic interest to attempt to keep CLECs out of its market." *Id.* at 48a. While each defendant might gain certain benefits from *other* incumbents' efforts to exclude CLECs, "[n]o agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained from parallel action" and "the motives that plaintiffs have proffered do not provide any basis to infer" that defendants' conduct was the result of agreement. *Id.* at 50a.

With regard to plaintiffs' allegation that defendants agreed not to expand into each others' territories, the court noted that "geographic segregation . . . might be enough . . . to support an inference of conspiracy, in most industries, where one could view the defendants as non-monopolistic competitors who had . . . apparently arranged [the market] into a pattern of territorial fiefdoms." *Id.* at 47a. In this case, however, the Bell companies were "given monopolies in their respective territories" and were "prevented from [competing prior to 1996] by the entry barriers protecting each" company's territory. *Id.*

The court thus held that, "[i]n light of the structure of the market as evidenced by the allegations in the Amended Complaint and the provisions of the 1996 Act, . . . it is apparent that this conduct is also attributable to defendants' individual economic interests, and therefore does not raise an inference of conspiracy." *Id.* at 51a. The court carefully reviewed the history of regulation, the terms of the statute, and the allegations of the complaint – particularly those describing in detail the difficulties faced by new local service entrants – and concluded that "[f]or an ILEC to compete as a CLEC in an adjoining ILEC's territory would not be simply to extend their existing business into a neighboring region, but rather would be to invest in undertaking an entirely different kind of business." *Id.* at 57a. "Given the obstacles to becoming a successful CLEC, . . . [i]t is no more surprising, and raises no more inference of concerted action, that the

ILECs have not gone into business as CLECs than that they have all collectively failed to enter some other line of business." *Id.*

3. The Court of Appeals' Opinion

The Second Circuit reversed, concluding that "the district court applied an incorrect standard for evaluating the defendants' motion to dismiss." Pet. App. 10a-11a. The court of appeals held that allegations of parallel conduct coupled with a bald assertion that the defendants were participants in a "conspiracy" are sufficient to state a claim under Section 1. Accordingly, the court of appeals said that it did not even need to address the district court's conclusion that the facts alleged in the complaint failed to support any inference that the alleged parallel conduct was the result of a conspiracy rather than independent action in each defendant's economic self-interest. Under the proper standard, the court of appeals held, the district court's analysis was simply unnecessary. *Id.*

The court of appeals acknowledged that "a bare bones statement of conspiracy . . . without any supporting facts permits dismissal." *Id.* at 16a (internal quotation marks omitted). And the court stated that "[t]he factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities." *Id.* at 19a (footnote omitted). But the court held that "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy." *Id.* at 25a. "[T]o rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim," the court stated, "a court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Id.* (emphasis added). Because it is almost always *possible* that parallel conduct, however unremarkable, was the result of an agreement, the court of appeals believed that any detailed analysis of the complaint of the sort performed by the

district court is not allowed in considering a motion to dismiss. *See id.* at 10a-11a.

Accordingly, the court of appeals held that "plaintiffs have satisfied their burden at the pleading stage." *Id.* at 30a. Devoting approximately three pages of the 43-page slip opinion to the issue, the court concluded that, "[w]hile the amended complaint does not identify specific instances of conspiratorial conduct or communications, it does set forth the temporal and geographic parameters of the alleged illegal activity and the identities of the alleged key participants," by which the court of appeals meant only that the conspiracy was alleged to have begun "around the time the Telecommunications Act became law" and that the "alleged key participants" were the named corporate defendants. *Id.* at 31a.[2]

The court of appeals said it was "mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." *Id.* at 30a. But the court held that, "[i]f that balance is to be recalibrated, . . . it is Congress or the Supreme Court that must do so." *Id.*

The Second Circuit denied rehearing on January 3, 2006. *See id.* at 59a-60a.

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[2] The Second Circuit suggested that allegations that ILECs attempted to exclude CLECs from their respective territories could constitute "parallel conduct against their self-interest," but explicitly did not rely on that suggestion in its ruling. Pet. App. 32a n.15. The suggestion is in any event paradoxical, given each ILEC's obvious self-interest to prevail over its CLEC rivals. *See* pp. 21-22, *infra*.

REASONS FOR GRANTING THE PETITION

The Second Circuit turned its back on substantive antitrust standards and the requirements of Rule 8 by holding that this complaint – which merely recites parallel business conduct and adds a bald assertion that the conduct is the result of a "conspiracy" – states a claim under Section 1. That decision conflicts with the decisions of other circuits and is inconsistent with this Court's precedent. The Second Circuit's decision has provided a roadmap for nuisance plaintiffs, inviting frivolous suits that burden courts and impose incalculable costs on antitrust defendants. And it frustrates fundamental antitrust policy by failing to recognize that parallel marketplace conduct is most often the result, not of conspiracy, but of the vigorous competition that the antitrust laws are designed to promote. This Court should grant certiorari to correct the Second Circuit's error, to unify the approach taken by the lower courts, and to forestall the avalanche of wasteful litigation that would otherwise result.

I. THE STANDARD ADOPTED BY THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. Because Unilateral But Parallel Conduct Is Lawful, a Complaint Alleging a Violation of Section 1 Based on Parallel Conduct Must Allege Additional Facts Supporting an Inference of Conspiracy

1. As Judge Lynch noted, the sufficiency of plaintiffs' complaint must be evaluated in light of substantive antitrust principles. First, the Sherman Act "contains a 'basic distinction between concerted and independent action.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization." *Id.* at 768. By contrast, "Section 1 of the Sherman Act requires that there be a contract, combination . . . or conspiracy . . . in order to establish a violation.

Independent action is not proscribed." *Monsanto*, 465 U.S. at 761 (internal quotation marks and citation omitted; first ellipsis in original).

Second, mere "parallel" conduct by the defendants is not enough to show conspiracy. Simply stated, "there is no basis for inferring any kind of agreement from . . . mere parallel behavior." 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410a, at 60 (2d ed. 2002) ("Areeda & Hovenkamp"). Similarly situated businesses may face common business problems or incentives and arrive at common decisions without regard to their competitors' decisions. Parallel conduct may even depend on the conduct of competitors, but nevertheless fail to imply the existence of any conspiracy. Thus, it has long been recognized that even interdependent conduct, known as "conscious parallelism," is "not in itself unlawful." *Id.*; *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (competing firms may "recogniz[e] their shared economic interests" and act in parallel without violating Section 1); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."). To allow too-easy inference of conspiracy based on parallel conduct, the Court has stressed, would "deter or penalize perfectly legitimate conduct" and hence "both inhibit management's exercise of independent business judgment and emasculate the terms of the statute." *Monsanto*, 465 U.S. at 764.

Accordingly, in the absence of any direct evidence of conspiracy – for example, an admission of illegal collusion or written evidence of illegal agreement – "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently" – that is, without reaching an agreement that is prohibited by Section 1. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting

Monsanto, 465 U.S. at 764). Such allegations – commonly referred to as "plus factors" – usually involve "a showing that the defendants' behavior would not be reasonable or explicable (i.e., not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (internal quotation marks omitted); *see also, e.g., In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1699 (2005); *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 762, 764 (5th Cir. 2002); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1033 (8th Cir. 2000); *In re Citric Acid Litig.*, 191 F.3d 1090 (9th Cir. 1999).

2. The court of appeals held that these principles were inapplicable to plaintiffs' complaint because it was "reviewing the grant of a motion to dismiss, not the grant of a motion for summary judgment." Pet. App. 25a. The court instead held that, at the pleading stage, a plaintiff "must allege only the existence of a conspiracy" and a factual predicate that "include[s] conspiracy among the realm of 'plausible' possibilities." *Id.* And the court further held – relying on a 50-year-old decision of the Second Circuit, *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) – that "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy" unless "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a.

The court of appeals' standard squarely conflicts with this Court's antitrust rulings. Parallel conduct is not unlawful. *See Theatre Enters.*, 346 U.S. at 541. Therefore, an allegation that defendants acted in parallel does not, without more, state a claim under the antitrust laws. Rather, where, as here, a plaintiff seeks to establish the factual predicate for a conspiracy through allegations of parallel conduct, this Court's rulings in *Monsanto* and *Matsushita* require factual allegations that, under the governing legal standard, would support

the conclusion that the parallel conduct was the result of an illegal agreement.[3]

Nothing in Rule 8 or Rule 12(b) or this Court's decisions interpreting those rules modifies the underlying substantive rules of antitrust law. On a motion to dismiss, factual allegations in the complaint must be accepted as true, while at summary judgment the plaintiff bears the burden of identifying evidence sufficient to establish each element of a claim. *Compare Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), *with Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). But the legal standard under which the court evaluates the allegations for legal sufficiency is the same legal standard that the court applies at summary judgment. Thus, the complaint itself must allege facts that would state a claim under the substantive Section 1 standards established by this Court. *See* 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 544-48 (3d ed. 2004) ("[I]f the allegations in the complaint, taken as true, do not effectively state a claim for relief, the added assertion by the plaintiff that they do state a claim will not save the complaint.").

Judge Lynch captured the point exactly: "[t]he crucial inquiry . . . is what inferences naturally arise from the facts that plaintiffs have pled, taking all facts . . . as true." Pet. App. 46a. By contrast, the Second Circuit's test – which permits an inference of conspiracy from a mere allegation of parallel conduct – does not require plaintiffs to establish the legal sufficiency of their complaint. As the district court correctly concluded, the requirement that a plaintiff allege facts to support a claim of conspiracy under this Court's established standards is mandated both by the plain terms of Rule 8 –

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[3] That collusion is one "plausible possibilit[y]" of parallel conduct does not, of course, mean that independent action is not also plausible, or even *more* plausible. The Second Circuit's mere-plausibility threshold therefore does not require facts that "'tend[] to exclude'" the independent-action possibility. *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764).

which requires the plaintiff to "show[ ] that [he] is entitled to relief," Fed. R. Civ. P. 8(a) – and by the core purpose of Rule 8 – which is to provide a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

3. The court of appeals, citing this Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), concluded that it was improper to burden plaintiffs alleging a conspiracy with any obligation to plead specific facts from which the existence of such a conspiracy could reasonably be inferred. But the court of appeals misunderstood *Swierkiewicz* and ignored this Court's later decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005).

In *Swierkiewicz*, this Court reversed an order of the Second Circuit affirming dismissal of a claim of employment discrimination based on national origin and age. The plaintiff alleged that the French chief executive fired him and replaced him with a younger, less qualified French employee. *See* 534 U.S. at 508. The Second Circuit held that the plaintiff had failed to allege facts "constituting a prima facie case of discrimination" under the Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Swierkiewicz*, 524 U.S. at 509. A unanimous Court held that, "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Id.* at 511. Instead, the plaintiff might be able to provide "direct evidence of discrimination." *Id.* Given that the complaint "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved," the complaint gave the defendant "fair notice of what [the plaintiff's] claims are and the grounds upon which they rest" and "state[d] claims upon which relief could be granted." *Id.* at 514.

As the district court correctly ruled, *Swierkiewicz* does not suggest that plaintiffs' complaint meets Rule 8 standards. The requirement that a plaintiff plead facts sufficient to show a conspiracy "is simply not analogous" to the requirement, disapproved in *Swierkiewicz*, that a plaintiff plead a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964. Pet. App. 44a. Unlike discrimination based on national origin, parallel conduct is not unlawful. Accordingly, "allowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1's requirement of a conspiracy and Rule 8's requirement that complaints state claims on which relief can be granted." *Id.* And, unlike the complaint in *Swierkiewicz* – which alleged the who, what, where, when, and why facts underlying a straightforward legal claim – the complaint here contains a bare allegation of conspiracy that fails "to give defendants notice" of the factual basis for the legal claim. *Id.* at 45a. "[A] plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend such a claim without having some idea of how and why the defendants are alleged to have conspired." *Id.*

Indeed, just three Terms later, a unanimous Court in *Dura Pharmaceuticals* made clear that *Swierkiewicz* had not altered the principle that the sufficiency of a pleading must be judged by reference to whether the facts alleged in the complaint satisfy the legal standards governing the plaintiff's claim. The Ninth Circuit had allowed a securities class action to proceed despite the plaintiffs' failure adequately to allege two elements of their claim for their securities fraud – proximate causation and economic loss. *See* 125 S. Ct. at 1629. The Court ruled, first, that to establish these two elements, the plaintiffs were required to prove not merely that they paid an "inflated purchase price" but also that the alleged misrepresentation proximately caused a loss, as those concepts have been traditionally understood. *See id.* at 1631-33. Second, and critical here, the Court ruled that its "hold-

ing about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements." *Id.* at 1634. Although the complaint alleged that the plaintiffs "paid artificially inflated prices" and had suffered "damages," "the complaint nowhere . . . provides the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation." *Id.*

The Second Circuit never discussed *Dura Pharmaceuticals*, but it is that decision that controls this case. The court of appeals held that, to survive a motion to dismiss, allegations of "facts indicating parallel conduct" are sufficient. Pet. App. 25a. But, because a plaintiff cannot establish a claim under Section 1 by *proving* that the defendants engaged in parallel conduct, a plaintiff cannot state a claim under Section 1 by *alleging* that the defendants engaged in parallel conduct. *See Dura Pharms.*, 125 S. Ct. at 1634.

It is no answer, as the Second Circuit seemed to assume, that plaintiffs "may not be required to establish 'plus factors' at trial – if, for example, they can prove conspiracy directly." Pet. App. 26a. That suggestion, relying entirely on what *might* ultimately be "prove[d]," effectively wipes away any requirement that the complaint actually *allege* sufficient facts to state a claim. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), another complex antitrust case, this Court upheld dismissal, cautioning that "[i]t is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged." *Id.* at 526 & n.11. Yet, here, the Second Circuit has done precisely what this Court held is not "proper": it has allowed the complaint to proceed because collusion is a "plausible possibilit[y]" based on a "set of facts" *not* alleged. Pet. App. 25a.

Some legally sufficient underlying facts must be alleged; yet, here there are none. No specifics of the conspiracy are

alleged: the complaint does not specify the participants, the time period, the terms of the agreement, the mechanism of enforcement, or any other facts that would permit defendants to defend against the change. A bare assertion of conspiracy is not enough. As this Court has held, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors*, 459 U.S. at 528 n.17; *see also DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55, 56 (1st Cir. 1999) (Boudin, J.) (referring to "ample" case law for the proposition that a "court is not required to accept" "[c]onclusory allegations" of "conspiracy" or "agreement" if divorced from "more specific allegation[s]"); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place.") (internal quotation marks omitted); *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985).

Accordingly, there can be no justification for dispensing, as the Second Circuit did, with the requirement that the complaint allege "plus factors" for inferring a conspiracy from parallel conduct. In the absence of agreement, there is no claim under Section 1, and a plaintiff cannot satisfy the essential element of the claim simply by asserting, without any supporting facts, that an agreement was reached. The only facts alleged in the complaint that could potentially support its naked allegation of conspiracy are the allegations of parallel conduct and the surrounding market circumstances. The complaint in fact *explicitly* relied on the inferences from defendants' parallel conduct as the sole basis for the conspiracy allegation. *See* Am. Compl. ¶ 51 ("In the absence of any meaningful competition . . . and in light of the parallel course of conduct . . . , Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or

conspiracy"). In this circumstance, substantive antitrust standards require that the complaint allege facts supporting the conclusory allegation of a conspiracy.

B. The Decision Below Conflicts with Decisions of Other Courts of Appeals

The Second Circuit's holding not only departs from this Court's decisions but also conflicts with the law of at least three other circuits. The Tenth, First, and Sixth Circuits have all required plaintiffs pleading a claim under Section 1 to allege facts that, if true, would support a claim of conspiracy. In these circuits, an allegation of parallel conduct accompanied by a bald allegation of conspiracy is *not* enough to survive a motion to dismiss; those courts regard complaints such as the one in this case to be insufficient as a matter of law.

In *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989), the complaint alleged, *inter alia*, horizontal price fixing in violation of Section 1 based on allegedly parallel actions by transmission companies "to uniformly breach contracts with producers with an object and purpose of forcing producers to accept lower prices for natural gas." *Id.* at 1361 (internal quotation marks omitted). The Tenth Circuit affirmed dismissal of the complaint, holding that "[t]he antitrust plaintiff who relies on a theory of 'conscious parallelism' must establish that defendants engaged in consciously parallel action . . . which was contrary to their economic self-interest so as not to amount to a good faith business judgment." *Id.* (internal quotation marks omitted; ellipsis in original). Because the plaintiff "failed to allege *any* facts which would support an inference that the alleged actions by [the defendants] would be contrary to their economic interests absent an agreement," the complaint was properly dismissed. *Id.* The Second Circuit's decision, which did not cite or attempt to distinguish *Cayman Exploration*, and dispenses with any inquiry into whether the facts alleged suggest conduct inconsistent with independently pur-

sued self-interest, cannot be squared with the Tenth Circuit's decision.[4]

The First Circuit in *DM Research* likewise affirmed dismissal of a complaint that alleged a conspiracy to adopt faulty industry standards that had the effect of excluding the plaintiff's product from the market. Although, "[l]iterally read, the complaint does allege . . . a conspiracy," the court nevertheless held that it did not contain a sufficient "*factual* predicate" to support the conclusion that the defendants' conduct was the result of the conspiracy. 170 F.3d at 55-56. The First Circuit noted that "[c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition"; "terms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient *in conjunction with a more specific allegation* – for example, identifying a written agreement *or even a basis for inferring a tacit agreement* . . . but a court is not required to accept such terms as a sufficient basis for a complaint." *Id.* at 55, 56 (emphases added; citation omitted). The First Circuit concluded that "the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations. While this may mean that a civil plaintiff must do more detective work in advance, the reason is to protect society from the costs of highly unpromising litigation." *Id.* at 56.

The Second Circuit's decision also conflicts with the standard applied by the Sixth Circuit's decision in *NHL Players Association v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005). The court there held – applying circuit precedent derived from *Matsushita* – that a plaintiff could not allege a claim under Section 1 by pleading facts "equally consistent with independent conduct"; instead, a plaintiff must include allegations "showing that the defendants' ac-

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[4] Because it failed even to cite, much less grapple with, *Cayman Exploration*, the Second Circuit's bland assertion that its holding "comports with the law of our sister circuits," Pet. App. 22a n.6, cannot be accepted.

tions, taken independently, would be contrary to their economic self-interest." *Id.* at 475 (internal quotation marks omitted). Only after applying that standard, and concluding that the complaint satisfied it, did the Sixth Circuit hold the complaint sufficient. The Second Circuit's decision in this case rejects the legal standard that was expressly applied in the Sixth Circuit and will govern conduct and future litigation there.

Accordingly, the circuits are sharply divided on the proper standards for pleading a Section 1 conspiracy. Given the importance of the Second Circuit for the nation's commerce, the liberal venue rules in antitrust suits against companies doing business nationwide, and the stark terms of the holding below – essentially, a rule barring the dismissal of Section 1 conspiracy claims based on parallel conduct – the Second Circuit is certain to become a magnet for frivolous antitrust claims, turning the circuit into the forum of choice for such suits. *See* pp. 26-28, *infra*.

II. APPLICATION OF THE CORRECT LEGAL STANDARD REQUIRES DISMISSAL OF THE COMPLAINT IN THIS CASE

This case provides a perfect vehicle to address the legal issue presented because – as Judge Lynch's careful analysis illustrates – the complaint does not state a claim under the correct legal standard. The complaint's allegations are entirely consistent with wholly *independent* business conduct and so fail to state facts sufficient for inferring conspiracy under the *Monsanto/Matsushita* standard. That is, taking the complaint's allegations as true, each defendant's conduct is fully explained by considerations of business self-interest irrespective of any agreement with – indeed, irrespective of the conduct of – the other defendants.

A. The complaint is based on two supposed agreements. The first is an agreement to frustrate rivals' efforts to enter each of the defendants' respective markets by failing to live up to the network-sharing obligations of the 1996 Act. *See*

Am. Compl. ¶ 47. There is nothing suspicious from the point of view of antitrust law, however, about an incumbent's alleged reluctance to comply with the 1996 Act's sharing obligations. As this Court has recognized, the dealing with rivals that the 1996 Act requires is not something that an incumbent would ever "voluntarily" undertake. *Trinko*, 540 U.S. at 409. "The sharing obligation imposed by the 1996 Act created 'something brand new' . . . . The unbundled elements . . . exist only deep within the bowels of [the incumbent carriers]; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort." *Id.* at 410. The very purpose of these obligations is to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises" by providing competitors access to the incumbent's network at cut-rate prices. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 476 (2002). "Given that each ILEC has reason to want to avoid dealing with CLECs and having to 'subsidize' their entry into the market, each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." Pet. App. 49a.

Plaintiffs also alleged that defendants had "common motives to conspire" because "any CLEC that succeeded in one ILEC's territory would be more likely to 'present a competitive threat' in other ILECs' territories." *Id.* As the district court correctly observed, however, "[t]he asserted motivations to make an agreement . . . are not considerations that would affect [an ILEC's] initial decision as to whether or not to fight the CLECs in its own market." *Id.* Each defendant "could rationally expect that each of [the others] will reach the same conclusion . . . . No agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained" from other defendants' resistance to CLECs' efforts. *Id.* at 49a-50a.[5]

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[5] The district court's observation pays heed to this Court's analysis in *Monsanto*, which sharply limited the permissible inferences of agreement even in situations where observed conduct (*i.e.*, termination of a price-

B. The district court likewise properly dismissed the claim that defendants agreed to limit competition in each others' territories. Plaintiffs did not allege that firms currently in competition allocated the market by passing up available sales opportunities. Rather, the complaint alleged that each defendant declined to enter a *new line of business* – specifically, competition as a CLEC outside of its traditional service territory – which the complaint itself gives ample reasons for each defendant to avoid on its own independent determination.

Thus, the district court explained that the complaint itself recognized that "being a CLEC in another ILEC's territory is an entirely different business than being an ILEC." Pet. App. 51a. While the incumbent carrier "controls and maintains . . . telecommunications infrastructure," new entrants are "dependent on [their] relationship with the local ILEC." *Id.* at 51a-52a; *see also* Am. Compl. ¶ 47(*l*) ("Each Defendant[ ] possess[es] the exclusive and sole source of entry into its own local telephone and/or high speed internet services market").

That dependency provides ample reasons for each defendant independently to decide not to enter this different business. *See* Pet. App. 51a-58a. Like any new entrant, an ILEC competing out-of-region would "depend on the relevant ILEC"; and the profitability of the new entrant "will depend in substantial part on the terms that can be negotiated with the ILEC . . . and whether the ILEC fulfills its obligations" (*id.* at 52a), which – according to a central allegation of the complaint – the ILEC will resist doing. Those facts – from plaintiffs' own complaint – demonstrate that a decision not to devote scarce resources to the risky enterprise of becoming a

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cutting dealer) is consistent with conspiracy and where competing dealers have a motive to secure such an agreement. *See, e.g., Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 20-21 (1st Cir. 2004) (action by manufacturer in response to complaint by dealer does not support inference that agreement existed). The key question is whether the conduct is consistent with independent business self-interest.

CLEC – an enterprise subject to the ILECs' control and littered with the bodies of failed competitors – is perfectly rational and explicable on its own terms for each defendant acting entirely out of independently determined self-interest. Such facts – again, facts stated in the complaint itself – are the very opposite of the facts needed to *exclude* the possibility of independent action.[6]

"[A]n awareness of the significance of regulation," *Trinko*, 540 U.S. at 411, supports dismissal in another respect as well. Defendants have been intensely supervised by state and federal regulators since the passage of the 1996 Act. *See id.* at

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[6] Plaintiffs relied on the statement of Qwest CEO Richard Notebaert – who said that competing as a CLEC "might be a good way to turn a quick dollar but that doesn't make it right," Am. Compl. ¶ 42 – as support for the claim that competition as a CLEC presented an attractive business opportunity. As the district court rightly observed, Mr. Notebaert's statements "suggest only that he did not consider becoming a CLEC to be a sound long-term business plan" because "the legal landscape in which CLECs operate could have changed at any time." Pet. App. 56a. Indeed, later in the same article quoted by plaintiffs, Mr. Notebaert, while discussing the regulatory regime that requires incumbent firms to sell network elements to rivals at wholesale prices, is quoted as saying: "'I don't think it's a sustainable economic model.' . . . 'It's just a nuts pricing model.'" Jon Van, *Ameritech Customers Off Limits: Notabaert*, Chi. Trib., Oct. 31, 2002, at Business p.1. Moreover, another article cited in the complaint confirms that Mr. Notebaert believed that the relevant FCC rules would be "revised next year" and that it would be "*unwise* to base a business plan" on their continuation. Jon Van, *Lawmakers Seek Probe of Bells; Do Firms Agree Not To Compete?*, Chi. Trib., Dec. 19, 2002, at Business p.2 (emphasis added). In fact, although FCC regulations gave CLECs a temporary boost, incumbent LECs' network-sharing obligations have been substantially reduced as a result of judicial decisions and new FCC rulemaking. *See generally* Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), *petitions for review pending, Covad Communications Co. v. FCC*, Nos. 05-1095, *et al.* (D.C. Cir., to be argued March 21, 2006). Actions that are in a party's "long-run interest" are not "contrary to its self-interest" and thus "tell[ ] us nothing about possible conspiracy." 6 Areeda & Hovenkamp ¶ 1415e, at 99-100.

412 ("To be allowed to enter the long-distance market in the first place, an incumbent LEC must be on good behavior in its local market."). In that climate of constant scrutiny, no government enforcement official has suggested that parallel reluctance to enter into new markets (or parallel resistance to CLECs' demands) is suggestive of conspiracy. To the contrary, the Assistant Attorney General for Antitrust testified before Congress that he was "familiar" with the conduct that is cited in the complaint but did not believe it constituted evidence of an antitrust violation. *Antitrust Enforcement Agencies – The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 77, 79 (July 24, 2003) (Testimony of R. Hewitt Pate). He testified that, "[i]f at any time we think that we have evidence of a concerted agreement to allocate markets, or to decline to compete, we will act very aggressively against it," but that the Antitrust Division "monitor[s] this situation very closely" and was "not aware of evidence of any such agreement" by the ILECs. *Id.*

More generally, it is difficult to imagine that any allegation that defendants "in parallel" failed to enter a new line of business or exploit an untested opportunity would support an inference of conspiracy. Firms have multiple demands on scarce capital, new entry is always risky, and a firm can exploit only a small fraction of available opportunities. Where, as a result of historical accident or deliberate design, two firms compete in adjacent territories, the failure of one to compete in another's region is not evidence even of interdependence: as stated in the leading antitrust treatise, there is no reason to believe that the decision turns on the possibility of retaliatory entry. *See* 6 Areeda & Hovenkamp ¶ 1410c, at 64 (failure of rivals to "sell in the other's area although each is capable of doing so" is *not* evidence of interdependence).

The inherent uncertainty of new entry is reflected in the rule of antitrust law that a plaintiff that claims to be a poten-

tial entrant is denied antitrust standing to challenge exclusionary conduct *unless* the plaintiff has taken "actual and substantial affirmative steps toward entry, such as the consummation of relevant contracts and procurement of necessary facilities and equipment." *Andrx Pharms., Inc. v. Biovail Corp.*, 256 F.3d 799, 807 (D.C. Cir. 2001) (internal quotation marks omitted); *see also, e.g., In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1465 (9th Cir. 1993); *Out Front Productions, Inc. v. Magid*, 748 F.2d 166, 170 (3d Cir. 1984) ("[A] company expanding either into a new geographic territory or product line . . . must show not only that it had the background, experience, and financial ability to make a viable entrance, but even more important, that it took affirmative actions to pursue the new line of business."). That limitation on standing makes sense precisely because a variety of factors – not least the availability of more attractive opportunities elsewhere – may lead a firm to pass up what may appear to others to be a potentially profitable new venture. And that limitation underscores the inappropriateness of inferring agreement from the type of parallel *in*action alleged here.

III. THE CASE PRESENTS A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE

A. The standard adopted by the Second Circuit invites frivolous litigation, imposing significant burdens on the courts and on private businesses. Indeed, the Second Circuit squarely acknowledged the perverse incentives that its rule creates. *See* Pet. App. 30a. By allowing plaintiffs to "drag[] a defendant past the pleading threshold," *DM Research*, 170 F.3d at 55 (internal quotation marks omitted), based on allegations of parallel conduct – combined with a conclusory allegation of conspiracy – the Second Circuit encourages the filing of suits solely to extract settlements that enrich attorneys at the expense of consumers and the economy as a whole. Nothing is easier than to allege that parallel conduct is the product of a conspiracy, if no supporting facts are required to support that allegation. But, as the Court held

unanimously in *Dura Pharmaceutcals*, defendants should not be put through the expense of litigation unless plaintiffs meet the burden of pleading a viable claim.

Antitrust suits are proverbially complex and expensive to litigate. "Because of the complexity of the issues and the breadth of the discovery allowed, antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit.'" 6 James Wm. Moore, *et al.*, *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2003). Precisely because discovery in antitrust cases is especially burdensome, lowering the bar at the pleading stage by relaxing substantive antitrust rules "condemn[s] defendants to potentially limitless 'fishing expeditions' – discovery pursued just 'in case anything turn[s] up' – in hopes . . . of a favorable settlement." Pet. App. 27a (footnotes omitted; second alteration in original). Commentators have noted that "[t]he risks associated with antitrust class actions . . . dictate that most cases will be on the fast track to settlement shortly after class certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, *Protecting Competition by Narrowing Noerr: A Reply*, 18 Antitrust 77, 78 (2003).

Such settlements are contrary to antitrust policy because they hurt the very consumers that antitrust rules are designed to protect; the costs of extortionate settlements are (at least in part) inevitably passed on to consumers, while the threat of facing a burdensome strike suit may actually *discourage* aggressive competition by companies that fear their rational business decisions will be mistaken for collusive behavior. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a consumer welfare prescription.") (internal quotation marks omitted). Mindful of that concern, this Court has admonished that district courts "must be especially alert to identify frivolous claims brought to extort nuisance settlements," expressing confidence that antitrust litigation "need not result in administrative chaos, class-action harassment, or 'windfall' settlements *if the dis-*

trict courts exercise sound discretion and use the tools available." *Id.* at 345 (emphasis added). One of those tools, specifically endorsed by this Court in *Associated General Contractors*, is to demand that a plaintiff plead the elements of his antitrust claim with appropriate specificity. *See* 459 U.S. at 528. The district court here did precisely that, yet the Second Circuit reversed, taking this tool away from district courts and inviting the very nuisance suits that this Court condemned. *See also Dura Pharms.*, 125 S. Ct. at 1634 (noting danger of permitting "a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence") (internal quotation marks omitted; alteration in original).

The United States made a comparable point in successfully urging *certiorari* in the securities law context in *Dura*. The Government observed that efforts "to ensure the integrity of the securities markets, and thereby protect the investing public . . . are likely to be hindered rather than furthered by permitting private . . . suits to proceed past the pleading stage" without proper supporting allegations. Brief for the United States as Amicus Curiae at 14, *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed May 28, 2004) ("U.S. *Dura Pharms.* Br."). "[R]equiring issuers of securities to expend time and resources litigating, and in most cases settling, such lawsuits . . . is more likely to harm than to aid 'the intended beneficiaries'" of the statute. *Id.* Precisely the same is true here: the "colossal" cost of litigating suits that the Second Circuit frankly characterized as "meritless," Pet. App. 30a – avoidable only through the payment of "blackmail settlements," Henry J. Friendly, *Federal Jurisdiction* 120 (1973) – imposes a tax on legitimate business conduct for the benefit of a small cadre of plaintiffs' lawyers, to the detriment of all consumers.

B. The case's interlocutory posture should pose no obstacle to review. Where the very issue presented is the proper

standard for dismissal at the pleading stage, review of the decision at that stage is particularly appropriate. Moreover, many of this Court's leading antitrust precedents were decided upon review of appellate decisions reversing dismissal (including two recent Second Circuit cases that this Court unanimously reversed).[7] In those cases, as here, the court of appeals had "decided an important issue, otherwise worthy of review, and Supreme Court intervention [could] serve to hasten or finally resolve the litigation." Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002).

Indeed, immediate review is imperative to forestall the dangers that the Second Circuit itself anticipated likely would flow from its holding. Particularly in light of the unusual commercial importance of the Second Circuit as a forum and the liberal venue rules under the Sherman Act for companies doing business nationwide, there is every reason to expect that would-be plaintiffs will take advantage of this permissive precedent and shun jurisdictions that apply ordinary antitrust standards at the pleading stage. "And while review by this Court could be sought in a case in which some other court of appeals affirmed the dismissal of a complaint . . . many class-action counsel would be reluctant to seek certiorari in such a case because of the risk of affirmance, which would make that standard applicable nationwide." U.S. *Dura Pharms.* Br. at 18-19. Resolution of this critical issue of antitrust law should not wait.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] *See, e.g., Trinko*, 540 U.S. 398; *NYNEX*, 525 U.S. 128; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Associated Gen. Contractors*, 459 U.S. 519; *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

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March 6, 2006

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-9213

WILLIAM TWOMBLY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL, INC., SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York

[Argued Sept. 15, 2004]

[Decided Oct. 3, 2005]

Before: SACK, RAGGI, and HALL, Circuit Judges.

SACK, Circuit Judge.

In an amended complaint filed in the United States District Court for the Southern District of New York, the plaintiffs allege that the defendant telecommunications providers[1] con-

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[1] The defendants-appellees are: Bell Atlantic Corp. ("Bell Atlantic"), BellSouth Corp. ("BellSouth"), Qwest Communications International,

spired not to compete against one another in their respective geographic markets for local telephone and high-speed Internet services, and to prevent competitors from entering those markets, in violation of Section 1 of the Sherman Act. At the time the complaint was filed, Section 1 provided:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (2000) (amended 2004).[2] The district court (Gerard E. Lynch, *Judge*) concluded that the amended complaint fails to allege sufficient facts from which a conspiracy can be inferred and therefore granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

Because we disagree with the standard that the district court applied in reviewing the sufficiency of the plaintiffs' allegations, we vacate its judgment and remand for further proceedings.

Inc. ("Qwest"), SBC Communications Inc. ("SBC"), and Verizon Communications Inc. ("Verizon").

[2] The penalty provisions of the Sherman Act were amended on June 22, 2004, after this appeal was filed, to increase the maximum fines to $100,000,000 for a corporation and $1,000,000 for any other person, or imprisonment of up to ten years, or both. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub.L. No. 108-237, tit. II, § 215(a), 118 Stat. 661, 668.

BACKGROUND

This case arises in the wake of the Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56 (codified at scattered sections of Titles 15 and 47 of the United States Code) ("Telecommunications Act" or the "Act"), which was designed to promote competition in the market for local telephone service. *Twombly v. Bell Atl. Corp.*, 313 F.Supp.2d 174, 177 (S.D.N.Y.2003). The Act requires that the defendants – so-called "Baby Bells" or "Incumbent Local Exchange Carriers" ("ILECs"), which were created following the 1984 breakup of the American Telephone & Telegraph Co. ("AT & T") – open their government-sanctioned regional monopolies over local telephone service to competition from so-called "Competitive Local Exchange Carriers" ("CLECs"), including by allowing CLECs to connect their own telephone networks to those of the ILECs, by providing the CLECs with access to the ILECs' network elements for "just, reasonable, and nondiscriminatory" rates, and by allowing the CLECs to purchase the ILECs' telecommunications services at wholesale rates for resale to subscribers. 47 U.S.C. § 251(c); *Twombly*, 313 F.Supp.2d at 177. In exchange, the Act permits the ILECs to enter the market for long-distance service in which they were prohibited from participating since the breakup of AT & T. 47 U.S.C. § 271; *Twombly*, 313 F.Supp.2d at 177.

The plaintiffs allege that the defendants, motivated by the desire to protect their respective geographic monopolies and otherwise unsustainable profit margins, have resisted the mandate of the 1996 Telecommunications Act by conspiring with one another to keep CLECs from competing successfully in the defendants' respective territories. *Twombly*, 313 F.Supp.2d at 177-78. The plaintiffs also allege that the defendants, who among them control more than ninety percent of the market for local telephone service in the United States, Amended Complaint ("Am.Compl.") ¶ 48, have agreed not to compete with one another in their respective territories, *id.* ¶¶ 40-41; *Twombly*, 313 F.Supp.2d at 178. According to the

plaintiffs, the result of this alleged conspiracy has been to drive CLECs out of business, to restrain competition in the market for local telephone and high-speed Internet services, and to injure the plaintiffs by forcing them, as consumers of those services, to pay at rates higher than they would otherwise pay in a competitive environment. *Twombly*, 313 F.Supp.2d at 178.

The amended complaint alleges several factual bases for its far-reaching claims of a two-pronged antitrust conspiracy.

Agreement Not to Compete

As an initial matter, the plaintiffs allege "parallel conduct" on the part of the ILECs in not competing with each other, which they assert "would be anomalous in the absence of an agreement . . . not to compete." Am. Compl. ¶ 40. Specifically, they allege that for various historical reasons, the defendants' respective service territories are not entirely contiguous, with some of the defendants serving pockets of territory that are entirely surrounded by the territories of their supposed competitors. *Id.* ¶¶ 40-41. For example, according to the allegations, defendant SBC serves most of the State of Connecticut, even though defendant Verizon serves the surrounding northeastern states, and SBC also serves California and Nevada, even though defendant Qwest serves the surrounding western states. *Id.* ¶ 40. Similarly, Verizon serves many small patches of territory in various western and midwestern states that are otherwise primarily served by SBC. *Id.* While the plaintiffs contend that these geographic anomalies should provide Verizon and Qwest with "substantial competitive advantages" in competing with SBC for business in Connecticut, and California and Nevada, respectively, and SBC with similar advantages in competing with Verizon in the west and midwest, none of those companies has sought to compete with the others "in a meaningful manner." *Id.* ¶ 41. The plaintiffs deem this to be a situation that would be "unlikely" absent an agreement not to compete. *Id.* They suggest that this result is especially odd in that the defendants

have publicly complained that the Telecommunications Act hurts their businesses by forcing them to provide CLECs with access to their networks at rates that are below the cost of maintaining those networks. *Id.* ¶ 39. By this same economic logic, the plaintiffs argue, the ILECs should be scrambling to compete with one another as CLECs, thereby benefitting from inexpensive access to their competitors' networks. *Id.*

The plaintiffs also point to a statement allegedly made by Richard Notebaert, the current Chief Executive Officer of defendant Qwest and the former Chief Executive Officer of Ameritech Corp., which merged with defendant SBC in 1999. *Id.* ¶ 42. In a newspaper article published in October 2002, Notebaert was quoted as saying that for Qwest, competing in the territory of SBC/Ameritech "might be a good way to turn a quick dollar but that doesn't make it right." *Id.* (quoting Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chi. Trib., Oct. 31, 2001, at Business 1). According to the plaintiffs, that statement, coming at a time when Qwest's revenues were declining and it was losing money, constituted an admission of collusive conduct among the ILECs. *Id.* ¶¶ 42-44.

And the plaintiffs point to a letter from two members of the House of Representatives to then-Attorney General John Ashcroft requesting that the Department of Justice investigate the extent to which the Baby Bells' "very apparent non-competition policy in each others' markets is coordinated." *Id.* ¶ 45 (quoting Letter from Rep. John Conyers Jr. and Rep. Zoe Lofgren to Att'y Gen. John D. Ashcroft (Dec. 18, 2002)).

In addition, the plaintiffs assert that the defendants communicate frequently with one another "through a myriad of organizations," providing an opportunity for a conspiracy to form and be conducted without the likelihood of detection. *Id.* ¶ 46. At the same time, they assert that "[t]he structure of the market for local telephone services is such as to make a market allocation agreement feasible" even in the absence of frequent communications, in part because "[i]f one of the [d]efendants had broken ranks and commenced competition in

another's territory the others would quickly have discovered that fact." *Id.* ¶¶ 48-49.

Agreement to Prevent CLECs from Competing Successfully

The plaintiffs further allege that from the day of the Telecommunications Act's enactment until the present, the defendants have sought to interfere with the ability of CLECs to compete successfully, including by negotiating "unfair agreements" with CLECs for access to the ILECs' telephone networks, by providing CLECs with poor quality connections to those networks, and by interfering with the CLECs' relationships with the CLECs' own customers, such as by continuing to bill customers even after they have entered agreements for services with CLECs. *Twombly*, 313 F.Supp.2d at 177-78; Am. Compl. ¶¶ 47, 64.

The plaintiffs cite a report by a consumer group, the Consumer Federation of America ("CFA"), which suggested that the defendants "'have refused to open their markets by dragging their feet in allowing competitors to interconnect, refusing to negotiate in good faith, litigating every nook and cranny of the law, and avoiding head-to-head competition like the plague.'" *Id.* ¶ 47 (quoting Consumer Fed'n of Am., *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster* 1 (Feb.2001)).

The plaintiffs allege that the defendants share a common motivation for their behavior in preventing the CLECs from competing because, were any one of the ILECs to allow meaningful competition in the geographic area it controls, "the resulting greater competitive inroads into that [d]efendant's territory would [reveal] the degree to which competitive entry by CLECs would [be] successful in the other territories in the absence of such conduct." Am. Compl. ¶ 50. Moreover, they contend, "the greater success of any CLEC that made substantial competitive inroads into one [d]efendant's territory would [enhance] the likelihood that

such a CLEC might present a competitive threat in other [d]efendants' territories as well." *Id.*

The District Court's Decision

In dismissing the plaintiffs' amended complaint, the district court concluded that the allegations of "conscious parallelism" of the defendants' actions, taken by themselves, are not sufficiently probative, on a motion to dismiss, of conspiratorial intentions that would support a finding of antitrust-law violations. *Twombly*, 313 F.Supp.2d at 179-82, 184, 189. Instead, applying this Circuit's case law with respect to Sherman Act claims at the summary judgment stage, the court required the plaintiffs to "establish[ ] at least one 'plus factor' that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." *Id.* at 179. Such a factor, the court noted, could be, for example, "evidence that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id.* (citing *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253-54 (2d Cir.1987), *cert. denied*, 484 U.S. 977, 108 S.Ct. 489, 98 L.Ed.2d 487 (1987), and *cert. denied sub nom. Coastal Corp. v. Apex Oil Co.*, 484 U.S. 977, 108 S.Ct. 489, 98 L.Ed.2d 487 (1987)). While acknowledging that applying this standard in the context of a motion to dismiss "is somewhat in tension with Fed.R.Civ.P. 8, which requires only a 'short and plain statement of the claim,'" *id.* at 180 (quoting Fed.R.Civ.P. 8), the court concluded that such a standard is nonetheless appropriate for two reasons. First, it wrote, insofar as parallel behavior by competing companies is not itself illegal absent an agreement to restrain trade, "the doctrine of conscious parallelism [would] allow[ ] plaintiffs to state a claim by alleging conduct that is, in itself, not prohibited by § 1 of the Sherman Act." *Id.* at 181. Accordingly, the court concluded, "allowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1's requirement of a conspiracy and Rule 8's requirement that complaints state claims on which relief can be granted." *Id.* Sec-

ond, the court continued, "allegations of plus factors are necessary to give defendants notice of plaintiff's theory of the conspiracy." *Id.* "[T]here is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired." *Id.*

Applying that standard, the court concluded that the plaintiffs fail to allege facts "suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest." *Id.* at 182. First, given the ILECs' stated opposition to the pricing structure imposed by the Telecommunications Act, the court wrote, their "parallel action" to "attempt to discourage CLECs from entering the market and to render it difficult for them to survive once they had entered . . . does not naturally give rise to an inference of an agreement, since the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id.* at 183.

Second, the district court also rejected the plaintiffs' claim that the defendants conspired not to compete against one another in their respective markets even though such behavior might have been financially advantageous to them in the short term. The court suggested that the plaintiffs' theory of the case erroneously assumes that operating a telephone business as an ILEC is substantially similar to operating a telephone business as a CLEC in territory controlled by another company. *Id.* at 185. In fact, the court wrote, the two businesses are "entirely different"; while ILECs are "self-sufficient," CLECs are "completely dependent" on their contractual relationships with the ILECs in whose territories they operate. *Id.* As a result, "an ILEC's market power in its home territory does not translate into market power as a CLEC in another ILEC's territory," such that "ILECs acting as CLECs are in much the same position as other, smaller, CLECs." *Id.* at 186. Even brand recognition and geographic proximity do not help, the court wrote, because the ILEC competing as a CLEC "is still dependent on its relationship with the [local] ILEC for survival." *Id.* at 186-87.

Moreover, the court noted, the plaintiffs' own allegations of how difficult it is to operate a successful CLEC cast doubt on their assertion that ILECs should be expected to attempt to compete with one another as CLECs in their respective territories. *Id.* at 187. "Plaintiffs' allegations raise the inference that each ILEC is well aware that becoming a CLEC in another market would be extremely difficult in the face of opposition from the local ILEC, because it is using the same tactics against CLECs in its market." *Id.* Accordingly, "there is no apparent reason for an ILEC to attempt to push out of its own territory and brave the barriers thrown up by other ILECs." *Id.*

Finally, the court rejected the plaintiffs' contention that the statement by Qwest CEO Notebaert in any way suggests collusion among the defendants. *Id.* at 188. "Considered in context," the court reasoned, "Notebaert's statement[] suggest[ed] only that he did not consider becoming a CLEC to be a sound long-term business plan, because all of the ILECs were challenging [47 U.S.C.] § 251 and its pricing structure through litigation, and the legal landscape in which CLECs operate could have changed at any time." *Id.*

The district court therefore granted the defendants' motion to dismiss the plaintiffs' complaint in its entirety. *Id.* at 189. The plaintiffs appeal.

DISCUSSION

On appeal, the plaintiffs argue principally that the district court erred by applying, on a motion to dismiss, a heightened, "plus factors" standard of pleading ordinarily applicable as the standard of proof at the summary judgment and trial stages. In addition, the plaintiffs contend that even were there a "plus factors" pleading requirement, the district court erred in applying that standard by not accepting all of the plaintiffs' allegations as true and by not drawing all inferences in their favor. Because we conclude that the district court applied an incorrect standard for evaluating the defendants' motion to

dismiss, we need not, and therefore do not, reach the plaintiffs' second argument.

I. Standard of Review

We review *de novo* the dismissal of a complaint for failure to state a claim, accepting as true all facts alleged in the complaint and drawing all inferences in favor of the plaintiff. *Todd v. Exxon Corp.*, 275 F.3d 191, 197 (2d Cir.2001). "A complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 197-98 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "At the pleading stage . . . the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir.2004) (citation, brackets, and internal quotation marks omitted).

II. The Notice Pleading Standard

A. General Principles

Fed.R.Civ.P. 11(b) provides:

> By presenting to the court . . . a pleading . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, [the pleading is presented for a proper purpose, and] –
>
> . . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support

> after a reasonable opportunity for further investigation or discovery . . . .

Id. At least in theory, then, when a complaint is filed by counsel, it arrives at the door of the district court with the warrant of counsel that "allegations and other factual contentions" contained in the complaint "have evidentiary support or, if specifically so identified" – presumably by being stated as being "to the best of [his or her] knowledge, information, and belief" – "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.* 11(b)(3).

As for the contents of the complaint, Rule 8(a) provides only that it "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed.R.Civ.P. 8(a); *see also id.*, Rule 8(e)(1) ("Each averment of a pleading shall be simple, concise, and direct."). As the Supreme Court recognized nearly half a century ago, the Rules thus set forth a pleading standard under which plaintiffs are required to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47, 78 S.Ct. 99. "Fair notice" is "that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so that it may be assigned the proper form of trial." *Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir.1995) (citation and internal quotation marks omitted). The complaint thus need not "set out in detail the facts upon which" the claim is based. *Conley*, 355 U.S. at 47, 78 S.Ct. 99.

"[T]he purpose of pleading is to facilitate a proper decision on the merits," *Conley*, 355 U.S. at 48, 78 S.Ct. 99, and not simply to screen out complaints based on a lack of artful lawyering before any facts have been discovered, *id.* "[O]rdinary pleading rules are not meant to impose a great

burden upon a plaintiff." *Dura Pharms., Inc. v. Broudo*, ---- U.S. ----, 125 S.Ct. 1627, 1634, 161 L.Ed.2d 577 (2005); *see also* Fed.R.Civ.P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").

B. Heightened Pleading Standards

The Rules do establish more demanding pleading requirements for certain kinds of claims. *See, e.g.*, Fed.R.Civ.P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). But as the language of Rule 9 makes clear, and as the Supreme Court has recently confirmed, instances requiring such particularized pleading are narrowly circumscribed by the Rules. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions."). Antitrust actions are not among those exceptions.

In *Swierkiewicz*, the Supreme Court noted that it had previously "declined to extend" heightened pleading requirements to "other contexts" beyond "fraud or mistake." *Id.* (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)); *see also Leatherman*, 507 U.S. at 168, 113 S.Ct. 1160 (noting that while "the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, [they] do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983[, and] *[e]xpressio unius est exclusio alterius*"). The *Swierkiewicz* Court unanimously reaffirmed that approach with respect to the allegations of employment discrimination before it. *See Swierkiewicz*, 534 U.S. at 513, 122 S.Ct. 992 ("[C]omplaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a)."). "A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 515, 122 S.Ct. 992 (quoting *Leatherman*, 507

U.S. at 168, 113 S.Ct. 1160). Echoing *Conley*, the Court explained that "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Id.* at 514, 122 S.Ct. 992.

Our recent opinion in *Wynder v. McMahon*, 360 F.3d 73 (2d Cir.2004), a race discrimination case, is instructive. The district court had "impos[ed] specific conditions on the form and content of" a complaint beyond those required by Rule 8(a). *Id.* at 74. We held that to have been improper. We said:

> It is hardly debatable that the district court's order called for the plaintiff to supply a complaint that substantially exceeded the requirements of Rule 8. Under *Swierkiewicz*, Rule 8 pleading is extremely permissive. 534 U.S. at 512-13, 122 S.Ct. 992. As the Supreme Court there noted, Rule 8(a)(2) provides (a) that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief," and (b) that such a statement simply "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" 534 U.S. at 512, 122 S.Ct. 992 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).[3]

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[3] Other provisions of Rule 8 are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the

> In the case before us, the district court demanded far more than a short and plain statement of the claims and the grounds upon which they rest.

Id. at 77. We went on to conclude that the plaintiff's pleading, however imperfect, had satisfied the permissive standard of Rule 8, rightly understood.

> In the case before us, plaintiff's submission is a model of neither clarity nor brevity, and we can sympathize with the district court's displeasure with it, but it is sufficient to put the defendants on fair notice. In *Simmons*, we defined fair notice as "that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so that it may be assigned the proper form of trial." 49 F.3d at 86 (internal quotation marks omitted); *see also Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir.1988) (fair notice is judged by whether the complaint enables defendants "to answer and prepare for trial"). [The plaintiff's] complaint, at its core, achieves these ends.

Id. at 79. We therefore vacated the district court's dismissal and remanded for further proceedings.

C. Heightened Pleading in Antitrust Cases

Antitrust claims are, for pleading purposes, no different. We have consistently rejected the argument – put forward by successive generations of lawyers representing clients defending against civil antitrust claims – that antitrust complaints merit a more rigorous pleading standard, whether because of their typical complexity and sometimes amorphous nature, or because of the related extraordinary burdens that litigation beyond the pleading stage may place on defendants and the courts. *See Todd*, 275 F.3d at 198 ("No heightened pleading

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court." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1202, p. 76 (2d ed.1990).

Wynder, 360 F.3d at 77 n. 6 (footnote in the original; renumbered).

requirements apply in antitrust cases."); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553-54 (2d Cir.1977) (rejecting the argument that "antitrust claims, because of their complexity, must be pleaded with greater specificity than other claims," and concluding that "a short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules. . . [;] [t]he discovery process is designed to provide whatever additional sharpening of the issues may be necessary"); *Nagler v. Admiral Corp.*, 248 F.2d 319, 322-23 (2d Cir.1957) (noting that "[i]t is true that antitrust litigation may be of wide scope and without a central point of attack, so that defense must be diffuse, prolonged, and costly," and that "many defense lawyers have strongly advocated more particularized pleading in this area of litigation," but concluding that "it is quite clear that the federal rules contain no special exceptions for antitrust cases"). Indeed, it has been argued from time to time that antitrust cases are less suitable candidates for dismissal at the pleading stage than some other kinds of litigation because evidence of the claimed illegality is likely to be in the exclusive control of the defendants. *See Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) ("[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962))).

True, we have said that "[a]lthough the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." *Heart Disease Research Found. v. Gen. Motors Corp.*, 463 F.2d 98, 100 (2d Cir.1972); *see also Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 299 (2d Cir.1965) ("A mere allegation that defendants violated the antitrust laws as to a particular plaintiff and commodity no

more complies with Rule 8 than an allegation which says only that a defendant made an undescribed contract with the plaintiff and breached it, or that a defendant owns a car and injured plaintiff by driving it negligently."). "[M]inimal requirements are not tantamount to nonexistent requirements." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir.1988).

In *Klebanow*, for example, we rejected as insufficient a complaint that alleged simply that the defendants had engaged "in an illegal contract combination and conspiracy with others, unknown to the plaintiffs, to restrain and monopolize trade in, and to fix the price of, cottonseed oil," causing damages in excess of $11 million. *Klebanow*, 344 F.2d at 296 (internal quotation marks omitted). Judge Friendly, writing for the Court, noted that the complaint "furnishe[d] not the slightest clue as to what conduct by the defendants is claimed to constitute 'an illegal contract combination and conspiracy.'" *Id.* at 299.[4]

But in *United States v. Employing Plasterers' Ass'n*, 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618 (1954), the Supreme Court considered a complaint in a civil action brought by the federal government against a trade association, a labor union, and the union's president. Between them, the defendants were responsible for some sixty percent of the Chicago-area plastering contracting market. *Id.* at 187, 74 S.Ct. 452. The government alleged that the defendants had violated Section 1 by "act[ing] in concert to suppress competition among local plastering contractors, . . . prevent[ing] out-of-state contractors from doing any business in the Chicago area and . . . bar[ring] entry of new local contractors without approval by a private examining board set up by the union." *Id.* at 188, 74 S.Ct. 452. "The effect of all this," according to the government, was "an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plas-

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[4] The Court concluded, however, that it would be "improper" to dismiss the case without permitting the plaintiffs to amend their pleadings. *Klebanow*, 344 F.2d at 299-300.

tering industry." *Id.* The district court dismissed the complaint, concluding "that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois." *Id.*

The Supreme Court disagreed, noting that "the complaint alleged that continuously [for more than a decade] a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all." *Id.* at 189, 74 S.Ct. 452. The Court continued:

> Under such circumstances it goes too far to say that the Government could not possibly produce enough evidence to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois. . . .
>
> The Government's complaint may be too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading. It does not charge too little. It includes every essential to show a violation of the Sherman Act. And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.

Id.

Three years later, the Court again emphasized the limited factual proffer required to satisfy the pleading requirement in a Section 1 case. It noted in *Radovich v. National Football League*, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957), that "[t]he test as to sufficiency laid down by Mr. Justice Holmes . . . is whether 'the claim is wholly frivolous,'" *id.* at 453, 77 S.Ct. 390 (quoting *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271, 274, 43 S.Ct. 540, 67 L.Ed. 977 (1923)). Although the Court acknowledged that "the complaint might have been more precise in its allegations con-

cerning the purpose and effect of the conspiracy," it concluded: "'[W]e are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress.'" *Id.* (quoting *Hart*, 262 U.S. at 274, 43 S.Ct. 540).

Less than eight months later, we cautioned against extensive antitrust pleading in which unnecessary details "double the bulk without increasing enlightenment." *Nagler*, 248 F.2d at 325. Describing the plaintiffs' complaint as an "imposing document consisting of twelve or more printed pages," *id.* at 324, we said that we "must look beyond the mere mountain of words to the meaning sought to be conveyed," *id.* at 325. "So looking," we concluded, "we can have no doubt that plaintiffs say the supplier defendants have given their favored customers . . . price discounts and other special favors (listed in some detail) which have lost sales to the plaintiffs, destroyed their capacity to compete, and forced some of them out of business." *Id.* While noting that the complaint did "lack a direct allegation that the defendants conspired together," we said that "as to this the trier of facts may draw an inference of agreement or concerted action from the 'conscious parallelism' of the defendants' acts of price cutting and the like." *Id.* Accordingly, we reversed the district court's dismissal of the complaint, concluding that the complaint should not "be burdened with possibly hundreds of specific instances" of the antitrust violations alleged. *Id.* at 326. "[S]uch pleading of the evidence is surely not required and is on the whole undesirable." *Id.* "It is a matter for the discovery process, not for allegations of detail in the complaint." *Id.*

The factual predicate that is pleaded does need to include conspiracy among the realm of plausible[5] possibilities. *See*,

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[5] One circuit court has employed this definition of "plausible" in another context: "'superficially worthy of belief: CREDIBLE.'" *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 664 (9th Cir.2003) (quoting Webster's Third New International Dictionary 1736 (1976)). The Supreme Court in *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), used the same term in the context of a motion for summary judgment. *See Matsushita*, 475 U.S.

e.g., *Todd*, 275 F.3d at 200 ("To survive a Rule 12(b)(6) motion to dismiss [in a Section 1 case], an alleged product market must [*inter alia*] . . . be 'plausible.'" (citing *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir.2000), *cert. denied*, 534 U.S. 888, 122 S.Ct. 201, 151 L.Ed.2d 142 (2001))); *see also DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 56 (1st Cir.1999) (affirming dismissal where, "without more detail, it is highly implausible to suppose that [one of the defendants] or its members ha[d] any reason to 'agree' with" the other defendant unlawfully); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1026 (10th Cir.1992) (dismissing antitrust complaint in part on the basis of the implausibility of the conspiracy alleged); *cf. Asahi Glass Co., Ltd. v. Pentech Pharms., Inc.*, 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, *J.*, sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase."). If a pleaded conspiracy is implausible on the basis of the facts as pleaded – if the allegations amount to no more than "unlikely speculations" – the complaint will be dismissed. *DM Research*, 170 F.3d at 56. But short of the extremes of "bare bones" and "implausibility," a complaint in an antitrust case need only contain the "short and plain statement of the claim showing that the pleader is entitled to relief" that Rule 8(a) requires.

We tackled this issue in the Section 1 context in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir.1996), *vacated on other grounds*, 525 U.S. 128, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998). Our analysis of the complaint under review began,

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at 596-97, 106 S.Ct. 1348 ("[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of Rule 56(e)."). As we note, however, language setting forth a summary judgment standard must be used with care in assessing a motion to dismiss.

> In this case, we believe that the District Court may have been misled by a poorly drafted complaint into categorizing the arrangement as one that is presumptively legal. Since the complaint may properly be understood to allege arrangements that might be shown to be unlawful, we are obliged to reverse in part and remand. We believe that the complaint states a cause of action under Section One of the Sherman Act . . . .

Id. at 1059.

We continued:

> To state a claim under Section One of the Sherman Act, [the plaintiff] must allege (1) that the NYNEX Defendants entered into a contract, combination, or conspiracy, and (2) that their agreement was in restraint of trade. *See* 15 U.S.C. § 1.

Id. And then, by way of footnote, we said:

> The NYNEX Defendants devote a single footnote in their brief to the argument that [the plaintiff] failed to allege a "conspiracy" in restraint of trade. Although [the plaintiff's] complaint is not a model of clarity, it alleges that NYNEX, MECo, and AT & T Technologies conspired to defraud the rate-paying public and that this agreement apparently contemplated some form of discrimination against [the plaintiff]. More specifically, the complaint alleges the existence of various meetings between NYNEX procurement personnel, MECo officers, and agents of AT & T Technologies. These allegations are sufficient to defeat a motion to dismiss.

Id., n. 3 (citation omitted). The Supreme Court reversed, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998), but on the grounds that the legal theory underlying the asserted cause of action was incorrect, not

that the factual allegations contained in the complaint were otherwise insufficient.[6]

While these decisions do not offer a bright-line rule for identifying the factual allegations required to state an antitrust claim, they suggest that the burden is relatively modest. The requirements of Rule 8 "notice pleading" as applied to claims under Section 1 of the Sherman Act remain relatively straightforward. Section 1 proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

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[6] The notion that a properly pleaded Section 1 claim must fall somewhere on the spectrum between providing more than not "furnish[ing] the slightest clue" as to what the defendants did wrong, *Klebanow*, 344 F.2d at 299, and offering "hundreds of specific instances" of malfeasance, *Nagler*, 248 F.2d at 326, comports with the law of our sister circuits, *see, e.g., S. Austin Coalition Cmty. Council v. SBC Communications Inc.*, 274 F.3d 1168, 1171 (7th Cir.2001) ("As long as Rule 8 stands unaltered, and there is no antitrust parallel to the Private Securities Litigation Reform Act, courts must follow the norm that a complaint is sufficient if any state of the world consistent with the complaint *could* support relief." (emphasis in original)), *cert. denied*, 537 U.S. 814, 123 S.Ct. 81, 154 L.Ed.2d 18 (2002); *DM Research, Inc.*, 170 F.3d at 55, 56 (noting that a Section 1 complaint "need not include evidentiary detail," but that "the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations"); *Estate Constr. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213, 221 (4th Cir.1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must provide, *whenever possible, some* details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place." (citations and internal quotation marks omitted, emphasis added)); *Mun. Utils. Bd. v. Ala. Power Co.*, 934 F.2d 1493, 1501 (11th Cir.1991) ("A plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified. . . . However, the alleged facts need not be spelled out with exactitude." (citation and internal quotation marks omitted)); *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 182 (3d Cir.1988) ("'Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment[, such as] . . . the date of the alleged conspiracy [or] its attendant circumstances . . . [or] who made [incriminating] statements, where, when or to whom.'") (quoting *Black & Yates v. Mahogany Ass'n*, 129 F.2d 227, 231-32 (3d Cir.1941)).

nations." 15 U.S.C. § 1. Interpreting this prohibition, the Supreme Court "has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997).[7] As a general matter, then, a Section 1 plaintiff must allege that (1) the defendants were involved in a contract, combination, or conspiracy that (2) operated unreasonably to restrain interstate trade, together with the factual predicate upon which those assertions are made. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95-96 (2d Cir.1998); *Discon, Inc.*, 93 F.3d at 1059.[8]

III. "Plus Factors" at the Pleading Stage

A. On Summary Judgment

A plaintiff's claim, under the ordinarily applicable standard, will not survive a defendant's motion for summary judgment – a stage that this litigation has, of course, yet to

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[7] Conduct can be deemed unreasonable in two ways. Certain conduct is considered *per se* unreasonable because it has "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit." *State Oil Co.*, 522 U.S. at 10, 118 S.Ct. 275. In most cases, however, conduct must be evaluated under a "rule of reason" standard, "according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Id.*

[8] These requirements generally accord with those of courts in other Circuits, though some courts have chosen to divide the inquiry into three prongs, rather than two. *See, e.g., Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir.2001); *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 157 (3d Cir.1999), *cert. denied*, 530 U.S. 1261, 120 S.Ct. 2716, 147 L.Ed.2d 982 (2000); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1158 (5th Cir.1992), *cert. denied sub nom. Dillard v. Sec. Pacific Corp.*, 506 U.S. 1079, 113 S.Ct. 1046, 122 L.Ed.2d 355 (1993); *In re Carbon Black Antitrust Litig.*, No. Civ. A. 03-10191-DPW, MDL No. 1543, 2005 WL 102966, at *5, 2005 U.S. Dist LEXIS 660, at *29 (D.Mass. Jan.18, 2005) [hereinafter "*Carbon Black*"].

reach – "[w]here the record taken as a whole could not lead a rational trier of fact to find for the [plaintiff on that claim]." *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In making this determination, all "'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the [plaintiff].'" *Id.* (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam)) (alteration in original). In a case brought under Section 1 of the Sherman Act, however, "the range of permissible inferences from ambiguous evidence" is limited, *id.* at 588, 106 S.Ct. 1348, because antitrust laws prohibit only contracts, combinations, or conspiracies – and not independent parallel conduct – that operate unreasonably to restrain trade, *see Apex Oil*, 822 F.2d at 253. Although "[p]arallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy," *id.*, it may also, as the district court in the instant case pointed out, "simply [be] the result of similar decisions by competitors who have the same information and the same basic economic interests," *Twombly*, 313 F.Supp.2d at 181. Accordingly, in a Section 1 case where there is no "direct, 'smoking gun' evidence," *Todd*, 275 F.3d at 198,

> conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive *a motion for summary judgment or for a directed verdict*, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently.

Matsushita, 475 U.S. at 588, 106 S.Ct. 1348 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) (citations omitted, emphasis added)). Thus, on a motion for summary judgment in a case involving alleged violations of Section 1, "courts have held that a plaintiff must show the existence of additional cir-

cumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil*, 822 F.2d at 253. These "plus factors" may include: "a common motive to conspire," *id.* at 254, evidence that "shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators," *id.* (citation and internal quotation marks omitted), and evidence of "a high level of interfirm communications," *id.*; *accord Todd*, 275 F.3d at 198.

B. On Motion to Dismiss.

We are reviewing the grant of a motion to dismiss, not the grant of a motion for summary judgment, however. To survive a motion to dismiss, as we have explained, an antitrust claimant must allege only the existence of a conspiracy and a sufficient supporting factual predicate on which that allegation is based.

As discussed in part II.C. of this opinion, the pleaded factual predicate must include conspiracy among the realm of "plausible" possibilities in order to survive a motion to dismiss. *Nagler* suggests that a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy. *Nagler*, 248 F.2d at 325. Thus, to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence. Of course, if a plaintiff can plead facts in addition to parallelism to support an inference of collusion – what we have referred to above as "plus factors" at the summary judgment stage – that only strengthens the plausibility of the conspiracy pleading. But plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal. Of course, as we have explained in the previous section of this opinion, *after* discovery, a plaintiff confronting a summary judgment motion is required to adduce admissible evidence of

"plus factors" if it seeks to have the trier of fact infer an unlawful conspiracy in restraint of trade from consciously parallel conduct.

We cannot know at the pleading stage whether the plaintiffs here will seek to rely on such an inference from parallelism based on "plus factors" or not. But there is no reason we can perceive to require the plaintiffs to include allegations of "plus factors" in their complaint, since they may not be required to establish "plus factors" at trial – if, for example, they can prove conspiracy directly.[9]

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[9] The plaintiffs point to the holdings of various district courts that have recently reached similar conclusions. *See In re Tableware Antitrust Litig.*, 363 F.Supp.2d 1203, 1206 (N.D.Cal.2005) (noting that "[i]n considering whether a complaint provides insufficient factual support for a legally viable theory of relief, a useful thought experiment is to ask 'what [the] plaintiff [could] plead in an amended complaint to repair the defect,'" and rejecting the proposition that Rule 8 requires allegations of "'when [the conspiracy] conversations took place, how many occurred, who participated, where the conversations took place, [and] what topics were discussed' as well as . . . 'meeting dates,' 'meeting places' and [names of] 'individuals employed by . . . [d]efendants who allegedly participated'"); *Carbon Black*, 2005 WL 102966, at *7 n. 7, 2005 U.S. Dist LEXIS 660, at *35 n. 7 (noting that where the question is "[h]ow much evidence of an illegal agreement must antitrust plaintiffs plead to avoid dismissal for failure to state a claim . . . [t]he answer is certainly some quantum less than will be required at later stages" of the litigation (citation and internal quotation marks omitted, first alteration in original)); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 356 F.Supp.2d 484, 492 (M.D.Pa.2005) (noting that "a plaintiff 'need *not* allege the existence of . . . plus factors in order to plead an antitrust cause of action'" (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 230 (3d Cir.2004) and adding emphasis)); *N. Jackson Pharmacy, Inc. v. Express Scripts, Inc.*, 345 F.Supp.2d 1279, 1286 (N.D.Ala.2004) (noting that "'plus factor' allegations serve to substantiate a plaintiff's conspiracy allegation; their purpose is not to clarify an otherwise incomprehensible claim," and that "[j]ust as an employment-discrimination plaintiff need not allege 'circumstances that support an inference of discrimination,' there is no need for an antitrust plaintiff to allege a 'plus factor [which] generates an inference of illegal price fixing.'" (citations omitted, second alteration in original)).

We acknowledge that district courts have occasionally elided the distinction between the standard applicable to Rule 12(b)(6) and Rule 56 motions on the basis of a well-founded concern that to do otherwise would be to condemn defendants to potentially limitless "fishing expeditions"[10] – discovery pursued just "in case anything turn[s] up"[11] – in hopes, perhaps, of a favorable settlement in any event. In several recent cases, including this one, district courts have dismissed Sherman Act complaints because they did not contain substantial allegations of facts beyond "conscious parallelism" sufficient to support an inference that the defendants' actions were more likely than not conspiratorial. *See Twombly*, 313 F.Supp.2d at 180 ("In the context of parallel conduct allegations, simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, 'bare bones' allegation of conspiracy."); *see also Kramer v. Pollock-Krasner Found.*, 890 F.Supp. 250, 256 (S.D.N.Y.1995) (dismissing a Sherman Act claim "for failure to allege a sufficient factual basis," because "the defendants' allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy"); *Yellow Page Solutions, Inc. v. Bell Atl. Yellow Pages Co.*, No. 00 CIV. 5663, 2001 WL 1468168, at *14, 2001 U.S. Dist. LEXIS 18831, at *42 (S.D.N.Y. Nov.19, 2001) (dismissing a

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[10] *But cf. Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947) ("[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.").

[11] Charles Dickens, *David Copperfield* 159 (Jeremy Tambling ed., Penguin Books 1996) (1850). *Cf. Weinstock v. Columbia Univ.*, 224 F.3d 33, 49-50 (2d Cir.2000) ("Plaintiff would have us follow the advice of David Copperfield's mentor, the amicable Mr. Micawber, and let matters proceed in the hope that 'something will turn up.' This notion is inconsistent with the text and policy behind Rule 56 of the Federal Rules of Civil Procedure, which was intended to prevent such calendar profligacy." (citation omitted)).

Sherman Act complaint for failure to state a claim because "uniformity does not permit an inference of a conspiracy where the conduct is in each party's individual self-interest"). *But cf. Levitch v. Columbia Broad. Sys., Inc.*, 495 F.Supp. 649, 675 (S.D.N.Y.1980) (dismissing a Sherman Act claim because "in order to state a valid claim under § 1, a plaintiff must, at a minimum, allege how [the defendants'] decisions are interdependent by at least suggesting that there is some reason to believe that the defendants were committed to a common end"), *aff'd*, 697 F.2d 495 (2d Cir.1983). As the district court in the instant case accurately stated: "While the Second Circuit's case law on parallel conduct conspiracies has developed mainly in the context of summary judgment, district courts have required that plaintiffs allege plus factors in order to withstand motions to dismiss as well." *Twombly*, 313 F.Supp.2d at 179-80.

The district court viewed the requirement that Section 1 plaintiffs plead "plus factors" as sensible because antitrust laws do not prohibit parallel conduct and because "the defendants [need] notice of plaintiff[s'] theory of the conspiracy." *Id.* at 181. To these considerations, the defendants add a third on appeal: the fear that, unless antitrust plaintiffs are required to plead "plus factors," "*any* claim asserting parallel conduct [will] survive a motion to dismiss." Appellees' Br. at 29. Without a heightened pleading requirement, the defendants predict, "[a]ntitrust cases [will] clog the courts for years, cost defendants millions of dollars to defend, and . . . threaten to reward plaintiffs' attorneys for bringing meritless claims." *Id.* at 29-30.

We are not unsympathetic to these concerns, but we find the arguments based on them ultimately unconvincing. At the pleading stage, we are concerned only with whether the defendants have "fair notice" of the claim, and the conspiracy that is alleged as part of the claim, against them – that is, enough to "enable [the defendants] to[, *inter alia*,] answer and prepare for trial," *Simmons*, 49 F.3d at 86 – not with whether the conspiracy can be established at trial.

The *Nagler* Court admonished that while an antitrust defense will often prove "diffuse, prolonged, and costly," *Nagler*, 248 F.2d at 322, the remedy to that problem is not to be found in abandoning the rules of notice pleading and raising the bar on plaintiffs in the absence of a legislative mandate to do so. "[A] considerable part of federal litigation is of a lengthy and burdensome nature and we are not justified in frowning on a Congressional policy so definitely cherished as is [that expressed by 15 U.S.C. § 1]." *Id.* at 326. Thus, in a regime that contemplates the enforcement of antitrust laws in large measure by private litigants, although litigation to summary judgment and beyond may place substantial financial and other burdens on the defendants, neither the Federal Rules nor the Supreme Court has placed on plaintiffs the requirement that they plead with special particularity the details of the conspiracies whose existence they allege. *Cf. Radovich*, 352 U.S. at 453-54, 77 S.Ct. 390 (noting that Congress "has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party," and that "[i]n the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws").[12]

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[12] The Federal Rules are not blind to the financial and other strains that meritless complaints place on defendants and on the judiciary. *See, e.g.*, Fed.R.Civ.P. 1 ("These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."). The Rules provide a variety of mechanisms for alleviating these burdens, *see, e.g.*, Fed.R.Civ.P. 11(c) (providing sanctions against parties for making frivolous or baseless claims, or claims brought for an improper purpose), including provisions for ridding the courts and defendants of clearly non-meritorious litigation before discovery, *see, e.g.*, Fed.R.Civ.P. 12(b)(6) (permitting dismissal for "failure to state a claim upon which relief can be granted"); Fed.R.Civ.P. 12(c) (permitting judgment on the pleadings). The Rules also provide "pretrial procedures . . . to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues," as well as to do away with non-meritorious claims as the litigation progresses. *Conley*, 355 U.S. at 48 & n. 9, 78 S.Ct. 99.

We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be re-calibrated, however, it is Congress or the Supreme Court that must do so.[13] *See Swierkiewicz*, 534 U.S. at 515, 122 S.Ct. 992 ("A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." (internal quotation marks and citation omitted)).

IV. Applying the Notice Pleading Standard to This Appeal

Accepting as true the facts alleged in the amended complaint, which are described at some length in the Background section of this opinion, above, and drawing all inferences in favor of the plaintiffs, we conclude that the plaintiffs have satisfied their burden at the pleading stage.

As the district court pointed out, to support their single claim of a conspiracy under Section 1 of the Sherman Act, the plaintiffs allege an agreement to employ two anticompetitive tactics to maintain their respective monopoly control over discrete geographic markets. *Twombly*, 313 F.Supp.2d at 182. Pursuant to the first tactic, the defendants allegedly conspired "to collectively keep CLECs from successfully entering [the defendants' respective] markets." *Id.* Pursuant to the other,

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[13] Congress has, for example, attempted to do just that with respect to securities litigation. *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1-2, 78j-1, 78u-4-5 (1997 & Supp.2003); Securities Litigation Uniform Standards Act of 1998, Pub.L. No. 105-353, 112 Stat. 3227 (amending scattered provisions of 15 U.S.C., including 15 U.S.C. §§ 77p, 77v, 78bb).

they allegedly agreed "to refrain from attempting to enter each other's markets as CLECs." *Id.*

The amended complaint alleges that the conspiracy began on February 6, 1996, around the time the Telecommunications Act became law, and has continued to the present day. Am. Compl. ¶ 64. It further alleges that the defendants together control more than ninety percent of the market for local telephone service in the continental United States, *id.* ¶ 48, and that they, together with other, unnamed "persons, firms, corporations and associations," engaged in the conspiracy, *id.* ¶ 16. While the amended complaint does not identify specific instances of conspiratorial conduct or communications, it does set forth the temporal and geographic parameters of the alleged illegal activity and the identities of the alleged key participants. It further alleges that the conduct was undertaken specifically to preserve historic monopoly conditions, and to thwart the pro-competitive purposes of the Telecommunications Act, *id.* ¶¶ 25-34, 47, a claim that, if true, would doubtless constitute an unreasonable restraint of trade. And it specifically alleges an effect on interstate commerce, noting that the defendants provide local telephone and high-speed Internet services "across state lines," that they "regularly and frequently solicited customers and sent bills and received payments via the mail throughout the United States," and that the "marketing, sale and provision of local telephone and/or high speed Internet services regularly occurs in and substantially affects interstate trade and commerce." *Id.* ¶ 52.

With respect to the allegation that the defendants conspired not to invade each other's territory, the amended complaint asserts that most of the defendants are dominant in particular geographic areas that surround small pieces of territory controlled by other defendants, yet none has attempted to compete meaningfully in the surrounded territories. Am. Compl. ¶¶ 40-41. The amended complaint further alleges that the ILECs have conceded that competing as CLECs would be inherently profitable, because they have complained that the Telecommunications Act requires them to charge CLECs be-

low-cost rates for network access. *Id.* ¶ 39. In addition, the amended complaint points to the alleged admission by defendant Qwest's CEO that such competition "might be a good way to turn a quick dollar but that doesn't make it right," even though Qwest was losing considerable amounts of money at the time the statement was made. *Id.* ¶¶ 42-44.[14]

The factual allegations in support of the alleged conspiracy to keep CLECs from entering the ILECs' respective territories are that the ILECs have engaged in a variety of activities, such as interfering with the CLECs' customer relationships by continuing to bill customers who switched to the CLECs' services, denying the CLECs access to essential network equipment and facilities, and providing erroneous and confusing bills to the CLECs for their services, all designed to drive the CLECs out of business. *Id.* ¶ 47. According to the amended complaint, the defendants have frequent opportunities to organize and conduct their conspiracy through industry organizations, *id.* ¶ 46, and a common incentive to do so, because were even one ILEC to decline to participate, a successful CLEC in its territory would be better positioned to compete against other ILECs and would demonstrate that CLECs could succeed in the absence of anti-competitive conduct, *id.* ¶ 50.[15]

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[14] The complaint also relies on a report by the CFA in support of the proposition that the defendants have "avoid[ed] head-to-head competition like the plague." Am. Compl. ¶ 47 (quoting CFA, *Lessons From 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster* 1 (Feb.2001) (citation and internal quotation marks omitted)). And it cites a letter from two members of the House of Representatives to the Attorney General requesting an investigation into alleged antitrust violations by the Baby Bells. *Id.* ¶ 45 (citing Letter from Rep. John Conyers Jr. and Rep. Zoe Lofgren to Attorney General John D. Ashcroft (Dec. 18, 2002)). These documents, however, even if they are ultimately deemed to constitute admissible evidence, are irrelevant at the pleading stage. An allegation that someone has made a similar allegation does not, without more, add anything to the complaint's allegations of fact.

[15] The fact that the defendants have engaged in parallel conduct against their self-interest has been recognized as a "plus factor" that, if proved at

We conclude that these allegations[16] are sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley*, 355 U.S. at 47, 78 S.Ct. 99, and to "enable [the defendants] to answer and prepare for trial," *Simmons*, 49 F.3d at 86. Under the principles we have described and our decision in *Discon, Inc. v. NYNEX Corp.*, *supra*, these allegations are enough successfully to withstand a motion to dismiss.

Whether the plaintiffs will be able to prevail in response to a motion for summary judgment after discovery or at trial is, of course, an entirely different matter. We have and express no view as to the merits of the plaintiffs' underlying claims and mean to imply none. Indeed, our analysis of the arguments made on appeal, which we have stated at some length, convinces us that it is premature to arrive at any such view. But even if "it . . . [were to] appear [to us] on the face of the pleadings that a recovery is very remote and unlikely . . . that is not the test" on a motion to dismiss, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), and would not warrant an affirmance here.

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trial, can support the inference of collusion necessary for a jury finding of conspiracy. *Apex Oil*, 822 F.2d at 254. Thus, while plaintiffs pursuing section 1 actions are not required to plead "plus factors" to state a claim of conspiracy based on parallel anticompetitive conduct, the fact that the plaintiffs appear to be able to do so here makes it particularly difficult to conclude that the allegations contained in the complaint are insufficient to state a claim.

[16] The amended complaint again cites the CFA report, this time for the proposition that the defendants' actions against CLECs may be coordinated. *Id.* ¶ 47. As we concluded, *supra* note 14, the CFA report consists of mere allegations, and thus does not provide factual support for the claims in the amended complaint.

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court and remand the case to the court for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 02 Civ. 10220 (GEL)

WILLIAM TWOMBLY AND LAWRENCE MARCUS,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BELL ATLANTIC CORP., BELLSOUTH CORP.,
QWEST COMMUNICATIONS INT'L, INC.,
SBC COMMUNICATIONS INC., AND
VERIZON COMMUNICATIONS INC.,
Defendants.

[Filed Oct. 8, 2003]

OPINION AND ORDER

LYNCH, District Judge.

Plaintiffs William Twombly and Lawrence Marcus bring this putative class action on behalf of themselves and all other individuals who purchased local telephone or high speed internet services in the continental United States between February 8, 1996, and the present. They allege that defendants Verizon Communications, Inc. ("Verizon"), BellSouth Corporation ("BellSouth"), Qwest Communications International, Inc. ("Qwest"), and SBC Communications, Inc. ("SBC"), (collectively, "defendants"), conspired to prevent competitive entry into their respective local telephone and internet services markets, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Defendants now move to dismiss plaintiffs' Amended Complaint, pursuant to Fed.R.Civ.P. 12(b)(6), for

failure to state a claim on which relief can be granted. For the reasons discussed below, defendants' motion will be granted.

BACKGROUND

The following facts are taken from the Amended Complaint, except where noted. All factual allegations in the Amended Complaint are assumed to be true for purposes of this motion.

Defendants Verizon, BellSouth, Qwest, and SBC together control over ninety percent of the market for local telephone and high-speed internet services in the continental United States. (Am.Compl.¶ 21.) They are the descendants of American Telephone and Telegraph Company ("AT & T"), and its wholly owned subsidiaries, the Bell Operating Companies ("BOCs") which in 1934 owned 80 percent of all local telephone lines and services in the country. (*Id.* ¶ 17.) While the provision of local telephone service was initially competitive, the inconvenience of navigating multiple, unconnected telephone networks led "to the establishment of telephone as a monopoly service" and to AT & T's dominance. H.R.Rep. No. 104-204(I) (1995), *reprinted in* 1996 USCCAN 10, 50.

In 1974, the United States filed suit against AT & T, alleging that it had violated the Sherman Act by using its control of local exchange facilities to suppress competition in related markets. (*Id.* ¶ 19.) Eight years later, the parties settled the case by entering into a consent decree, which the District Court memorialized by signing the Modified Final Judgment ("MFJ"), thereby creating the industry structure that persists today. (*Id.* ¶ 20.) In 1984, pursuant to the MFJ, AT & T divested itself of the seven regional Bell Operating Companies and exited from the local telephone market. (*Id.* ¶ 21.) The BOCs were given monopoly power over local telephone services in their respective regions, but were restricted from competing in the long distance market, and were required to provide exchange access to all interexchange (long-distance) carriers, such as Sprint and MCI. (*Id.* ¶ 20.) *See United States v. AT & T*, 552 F.Supp. 131 (D.D.C.1982).

The structure created by the MFJ allowed the seven BOCs exclusive control over their respective regions. This did not change even as the original seven merged into larger companies controlling larger regions, resulting in the four companies named as defendants controlling the local telephone markets for ninety percent of the continental United States. (Am.Compl.Ex. A.) Thus, since 1982, the local phone service market has consisted of "state-sanctioned local monopolies." *Law Offices of Curtis V. Trinko L.L.P. v. Bell Atlantic Corp.*, 305 F.3d 89, 93 (2d Cir.2002), *cert. granted, Verizon Comms., Inc. v. Law Offices of Curtis V. Trinko L.L.P.*, 538 U.S. 905, 123 S.Ct. 1480, 155 L.Ed.2d 224 (2003). (*See also* Am. Compl. ¶ 23.) While the business activities of these monopolies were heavily regulated by state and federal agencies, they were also "frequently protected from competition by government barriers to entry[, as] the majority of States restrict[ed] full and fair competition in the local exchange, either by statute or through the public utility commission's regulations." H.R.Rep. No. 104-204(I), 1996 USCCAN at 49. Thus, as plaintiffs allege, "[l]ocal exchange carriers historically operated in their local franchise areas free of competition, pursuant to exclusive franchises granted by state regulatory agencies." (Am.Compl.¶ 23.)

The Telecommunications Act of 1996, Pub.L. No. 104, 110 Stat. 56 (the "Act"), is designed to replace the heavy regulation in the local telephone markets with competition. H.R.Rep. No. 104-204(I), 1996 USCCAN at 50. It "opens the markets for both local telephone and long-distance services to effective competition." (Am.Compl.¶ 26.) Specifically, the Act requires incumbent local exchange carriers ("ILECs"), such as the defendants, to facilitate competitors' entry into their local telephone markets, in return for the opportunity to compete in the long-distance market. (*Id.* ¶ 30.) Because building their own telecommunications infrastructure would be prohibitively expensive for most competing local exchange carriers ("CLECs"), the Act provides CLECs with a shortcut

into the market by obligating ILECs to sell access to elements of their networks at wholesale rates. 47 U.S.C. § 251.

A CLEC may "obtain access to an incumbent's network in [one of] three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network on an unbundled basis; and it can interconnect its own [network] with the incumbent's network" and infrastructure. *AT & T v. Iowa Utils. Bd.*, 525 U.S. 366, 371-72, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (citing 47 U.S.C. § 251); *Trinko*, 305 F.3d at 94 (describing operation of § 251). (*See* Am. Compl. ¶ 32.) A CLEC's business is therefore founded on its relationship with the ILEC. This relationship is itself regulated by the duties that the Act places on ILECs, but the parties may opt out of the Act's provisions by negotiating an interconnection agreement and having it approved by a state commission. 47 U.S.C. § 252. The interconnection agreement, rather than § 251, then governs the relationship between the parties, and disputes arising thereunder may be arbitrated by the state commission. *Trinko*, 305 F.3d at 102-03.

Plaintiffs allege that, despite the Act's mandate that the ILECs provide access to their telecommunications infrastructure on "just, reasonable and non-discriminatory terms," (Am.Compl.¶¶ 27-28), the defendants have made it nearly impossible for CLECs to enter their local service markets. According to plaintiffs, defendants have refused to provide potential CLECs with network connections and services of equal quality to those they provide to their retail customers, billed CLEC customers in order to ruin CLECs' customer relations, delayed in providing network elements, refused CLECs the use of certain facilities, and generally used their "monopoly power and exclusive control over essential facilities" to negotiate unfair agreements with would-be CLECs. (*Id.* ¶ 47.) The complaint alleges that these actions were taken not simply on behalf of each individual defendant within its local territory, but pursuant to an agreement among all defendants to collectively thwart the efforts of competing

companies. (*Id.* ¶ 50.) Plaintiffs assert that this anti-competitive behavior has been quite successful, citing Congressman John Conyers's 2001 statement that potential CLECs "invested tens of billions of dollars . . . today, most of those companies have been devastated by the anti-competitive behavior and procrastination of the Bell monopolies." (Pls. Mem. at 2; Buchman Aff. Ex. B; *see also* Am. Compl. ¶ 47.)

Plaintiffs also allege that defendants have engaged in parallel conduct by not competing as CLECs in each others' respective territories, "which would be anomalous in the absence of an agreement among the [defendants] not to compete with one another." (Am.Compl.¶¶ 40-41.) Because the territories serviced by defendants are, in part, non-contiguous, sometimes looping around and surrounding each other (*see id.* Ex. B), defendants' collective failure to move into adjacent local phone service markets is, plaintiffs assert, highly suspicious. In addition, Qwest's CEO, Richard Notebaert, has made statements that could suggest that becoming CLECs in other markets would have been in defendants' economic interests, absent an agreement not to compete. (*Id.* ¶ 42.)

Defendants' alleged motives for conspiring, both to keep out CLECs in general, and to refrain from entering each others' territories, was to maintain their exclusive control over their respective territories, and to prevent any CLECs from succeeding, or discovering that it would be possible to succeed, in defendants' markets. (*Id.* ¶ 50.) As a result of the conspiracy, plaintiffs have been deprived of the opportunity to purchase local telephone and high-speed internet services from a CLEC rather than an ILEC, and have been forced to pay the supracompetitive rates of ILECs rather than the presumably lower rates that competition would have fostered. (*Id.* ¶ 66.)

Defendants now move to dismiss the Amended Complaint, asserting that plaintiffs have not alleged sufficient facts from which a conspiracy to violate the Sherman Act can be inferred, and that plaintiffs' claims for treble damages are

barred by the filed rate doctrine. (Defs. Mem. at 1-3.) Defendant BellSouth also moves to dismiss the suit as against it, for lack of personal jurisdiction. (BellSouth Mot. at 1.)

DISCUSSION

On a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court must accept "as true the facts alleged in the complaint," *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., Inc.*, 32 F.3d 697, 699-700 (2d Cir.1994), and may grant the motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Thomas v. City of New York*, 143 F.3d 31, 36 (2d Cir.1998) (citations omitted); *see also Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir.1996) (stating that when adjudicating motion to dismiss under Fed.R.Civ.P. 12(b)(6), the "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims" (internal quotation marks and citations omitted)). When deciding such a motion, the Court may consider documents attached to the complaint as exhibits or incorporated in it by reference, and such facts as are suitable for judicial notice pursuant to Fed.R.Evid. 201. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir.1991). All reasonable inferences are to be drawn in the plaintiffs' favor, which often makes it "difficult to resolve [certain questions] as a matter of law." *In re Independent Energy Holdings PLC*, 154 F.Supp.2d 741, 748 (S.D.N.Y.2001).

1. *The Pleading Standard*

Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy in restraint of trade or commerce." 15 U.S.C. § 1. Thus, absent an agreement among competitors to restrain trade, anti-competitive behavior does not violate § 1. *Modern Home Inst., Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 108-09 (2d Cir.1975) ("Fundamental then to any § 1 claim is the finding of an agreement, express or otherwise, between two or more persons."). Direct evidence of such an agreement is often impossible to obtain,

however, and so an illegal agreement must often be inferred from circumstantial evidence, including the public conduct and "business behavior" of competitors, as well as market facts. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 98 L.Ed. 273 (1954). Instances in which competing firms embark upon similar courses of conduct may suggest that the firms have agreed to manipulate the market in some way. However, the Supreme Court "has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." *Id.* at 541, 74 S.Ct. 257. Thus, while plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement, courts must be cognizant of the fact that, while "[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, . . .] 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Id.*

Moreover, parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions. Courts must therefore distinguish between conduct that represents the natural convergence of competitors' market behavior, and conduct that appears to have been taken pursuant to an agreement. In the summary judgment context, the Second Circuit requires plaintiffs to present evidence suggesting that the defendants' parallel conduct has resulted from an agreement rather than "merely from independent . . . conduct by firms acting in their own self-interests." *Kramer v. Pollock-Krasner Found.*, 890 F.Supp. 250, 255 (S.D.N.Y.1995) (citing *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir.1987)). Plaintiffs may satisfy this standard by establishing at least one "plus factor" that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior. The plus factors include evidence that the parallel behavior would have been against

individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire. *Apex Oil*, 822 F.2d at 253-54.

While the Second Circuit's case law on parallel conduct conspiracies has developed mainly in the context of summary judgment, district courts have required that plaintiffs allege plus factors in order to withstand motions to dismiss as well. *See, e.g., Kramer*, 890 F.Supp. at 255-56; *Levitch v. Columbia Broadcasting System, Inc.*, 495 F.Supp. 649, 675 (S.D.N.Y. 1980) (stating that "the vast majority of courts which have considered the question" have held that plaintiffs must allege facts suggesting the interdependence of the parallel conduct in order to state a claim). This requirement is necessary to ensure that plaintiffs actually state a claim on which relief can be granted, by separating complaints that allege simple parallel action that does not suggest a conspiracy and is therefore not actionable under § 1, from complaints that allege parallel action that could be the result of a conspiracy, and that plaintiffs are therefore entitled to explore in discovery.

The plus factors pleading requirement is also an expression of the longstanding rule that "a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal" of a complaint. *Heart Disease Res. Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir.1972). While there is no special pleading standard for conspiracy, simply alleging that two or more defendants participated in a "conspiracy," without more, is insufficient to withstand a motion to dismiss. *Yellow Page Solutions, Inc. v. Bell Atlantic Yellow Pages Co.*, No. 00 Civ. 5663(MBM), 2001 WL 1468168, at *9 (S.D.N.Y. Nov.19, 2001). Thus, plaintiffs must always assert facts that, if true, support the existence of a conspiracy, such as motivation or conduct that lends itself to an inference of an agreement. In the context of parallel conduct allegations, simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, "bare bones" allegation of conspiracy. *Id.* Viewed in

this light, the plus factors are simply examples of allegations that are sufficiently suggestive of a conspiracy to warrant discovery.

The requirement that plaintiffs allege specific facts suggesting a conspiracy is somewhat in tension with Fed.R.Civ.P. 8, which requires only a "short and plain statement of the claim," and allows plaintiffs to base their complaints on "statement[s] of ultimate facts," *Heart Disease Res. Found.*, 463 F.2d at 100. Indeed, plaintiffs argue that *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), establishes that plaintiffs need only assert that a conspiracy existed, rather than pleading any facts from which one can be inferred, because evidence gained in discovery may permit plaintiffs to prove their case with direct, rather than circumstantial, evidence. *Swierkiewicz* held that employment discrimination complaints need not allege the prima facie case established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), because the Title VII burden-shifting framework is designed to allow plaintiffs to prove discrimination with circumstantial evidence.[1] At the pleading stage, however, it is impossible to predict whether plaintiffs might discover direct evidence, and will therefore never need to avail themselves of *McDonnell Douglas* burden shifting. The extra pleading requirement therefore placed an artificial and unfair burden on plaintiffs. *Swierkiewicz*, 534 U.S. at 511-12, 122 S.Ct. 992. In support of its conclusion, the Court emphasized Rule 8's liberal standard of notice pleading, reasoning that alleging the elements of the Title VII

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[1] Under this rule, a plaintiff would not only have to allege that she was a member of a protected class, was qualified for her position, and suffered an adverse employment action, but also would have to state facts suggesting that the adverse employment action occurred under circumstances raising an inference of discrimination. *Swierkiewicz*, 534 U.S. at 509, 122 S.Ct. 992. This presented a problem for many plaintiffs who, before any kind of discovery, would not be aware of the facts necessary to support an inference of discrimination, such as how similarly situated employees had been treated, or the employer's overall employment practices.

prima facie case was unnecessary to give defendants notice of the claim. *Id.* at 513, 122 S.Ct. 992. Thus, plaintiffs contend that, like the Title VII prima facie case, the parallel action "plus factors" are an evidentiary construct designed to be used at the summary judgment stage, when plaintiffs must rely on inferential evidence, and that *Swierkiewicz* establishes that they need not be pled to withstand a motion to dismiss. (Pls. Mem. at 5.)

Plaintiffs concede, however, that *Swierkiewicz* did not change the law of pleading (Tr. 22),[2] but simply re-emphasized the principles behind Rule 8 in order to establish that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements, broad discovery, and use of summary judgment as the primary means of disposing of cases. *Swierkiewicz*, 534 U.S. at 513, 122 S.Ct. 992. Thus, *Heart Disease Research Foundation's* holding that plaintiffs must allege facts to support claims of conspiracy, even in light of Rule 8, 463 F.2d at 110, remains the law of this Circuit. This requirement of supporting facts is simply not analogous to the requirement that Title VII plaintiffs allege the *McDonnell Douglas* prima facie case, and is consistent with Rule 8 for two reasons.

First, the doctrine of conscious parallelism allows plaintiffs to state a claim by alleging conduct that is, in itself, not prohibited by § 1 of the Sherman Act. Because parallel conduct is often simply the result of similar decisions by competitors who have the same information and the same basic economic interests, allowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1's requirement of a conspiracy and Rule 8's requirement that complaints state claims on which relief can be granted. *Kramer*, 890 F.Supp. at 255-56. In contrast, a Title VII plaintiff can state a claim by alleging simply that she was discriminated

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[2] All cites to "Tr." refer to the transcript of the oral argument that took place before the Court on August 1, 2003.

against in her employment, and so requiring allegations of the prima facie case went beyond ensuring that a plaintiff had stated a legal claim, to adjudicating whether she would eventually be able to prove her claims.

Second, allegations of plus factors are necessary to give defendants notice of plaintiff's theory of the conspiracy. Because the factual basis of a Title VII claim is fairly self-evident – plaintiff suffered an adverse job action and alleges that it was the result of discrimination – the defendant will be apprised of the basic facts, and will know how to defend the action, even without the benefit of any allegations that raise the inference that discrimination actually occurred. In contrast, a plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired. The plus factors are therefore intended to give defendants notice of plaintiffs' legal theory, and of the "conduct which is alleged to be conspiratorial." *Levitch*, 495 F.Supp. at 675 ("This requirement is fully consistent with the liberal notice-pleading requirements in that it seeks only to notify the defendant of the legal theory upon which plaintiff intends to proceed."). Thus, the plus factors requirement is consistent with Rule 8, and remains in effect after *Swierkiewicz*.

II. *Plaintiffs' Allegations of Conspiracy*

Plaintiffs must allege facts from which a conspiracy can be inferred in order to state a claim under § 1. The alleged conspiracy between the defendants involved two agreements. (1) to collectively keep CLECs from successfully entering their markets, and (2) to refrain from attempting to enter each other's markets as CLECs. (Am.Compl.¶¶ 40, 47.) Thus, plaintiffs assert that, in furtherance of these agreements, defendants have all violated the provisions of the Act in order to render it impossible for CLECs to survive by competing to provide local telephone services, and have all failed to

become CLECs in each other's markets, despite the potential profits from doing so. Determining whether these instances of parallel behavior raise the inference that defendants agreed on their course of conduct involves examining plaintiffs' allegations as to the markets in which the defendants compete and their resulting economic interests.

This inquiry is admittedly difficult to distinguish from the factual analysis that is more appropriate to summary judgment, as is evidenced by the fact that cases involving motions to dismiss often cite summary judgment cases in support of their conclusions that plaintiffs have not alleged sufficient facts. *See, e.g., Kramer*, 890 F.Supp. at 255-56. While conclusory allegations may not suffice to state a claim, the Court must be cautious to avoid making findings or assumptions of fact without a complete factual record, and plaintiffs must not be expected to adduce evidence without having had the opportunity for discovery. The crucial inquiry, therefore, is what inferences naturally arise from the facts that plaintiffs have pled, taking all facts in the Amended Complaint as true. In the context of parallel conduct claims, the basic requirement that plaintiffs must fulfill is to allege facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest. This determination necessarily entails beginning with background propositions about how the market works when firms are competing, what it might look like if subject to an anti-competitive agreement, the economic interests of the market actors, and how those interests would cause them to act. While these questions resemble the factual issues that would have to be decided in the context of a summary judgment motion, on a motion to dismiss the Court may properly draw these background assumptions only from the facts pleaded in the complaint and the relevant statute, and may rely only on such background facts about the market and its history that are appropriate for judicial notice.

In this case, it is impossible to draw any inferences from plaintiffs' allegations regarding the state of the market actors relative to one another without being cognizant of the industry's history and regulation. Plaintiffs have attached to the Amended Complaint a map of defendants' respective territorial markets, which evidences the degree to which the defendants operate in separate markets. (Am.Compl.Ex. A.) Verizon controls the entire Northeast except for Connecticut; Bell South the Southeast; Qwest the Pacific Northwest and states as far east as Minnesota and as far south as New Mexico; and SBC the Midwest down to Texas, plus California and Nevada. (*Id.*) Thus, while the territories are not completely contiguous, the geographic segregation of the BOCs is striking. This overly neat allocation might be enough in itself to support an inference of conspiracy, in most industries, where one could view the defendants as non-monopolistic competitors who had begun competing in an open market and then apparently arranged it into a pattern of territorial fiefdoms. As discussed above, however, the telecommunications industry's history is hardly one of open competition between many firms. The BOCs were given monopolies in their respective territories as part of the MFJ in 1982, and state regulation maintained these monopolies and their boundaries up until 1996. (Am.Compl. ¶¶ 23, 27.) Even had the BOCs wanted to compete with each other, they would have been prevented from doing so by the entry barriers protecting each BOC. Thus, the geographic allocation evident from the map of BOC territories is not in itself suggestive of an anti-competitive agreement, shaped as it is by decades of state and federal regulation. The operative question, therefore, is whether it is possible to infer that the 1996 Act's permitting inter-territorial competition should have prompted the BOCs to move into each other's territories, and whether, seven years after the passage of the Act, the alleged failure of the BOCs to do so is suspicious enough to suggest a conspiracy.

Defendants argue that the fact that their respective territories have not merged into one competitive market is natural in

light of the industry's history and defendants' consequent economic interests. (Defs. Mem. at 14-17.) It is in each individual defendant's interests to keep CLECs out of their respective markets, they contend, and not in their interests to attempt to expand into other territories as CLECs. Accordingly, we must turn to the facts alleged in the Amended Complaint, to determine whether those allegations support an inference that defendants' conduct results from a conspiracy, rather than from their pursuit of their individual interests and the structure of the relevant markets.

A. *Conspiracy To Thwart CLECs*

Plaintiffs' theory that defendants acted pursuant to an agreement to keep CLECs from entering their markets by delaying their implementation of § 251 of the Act is not persuasive. Plaintiffs concede, as they must, that it is in each ILEC's individual economic interest to attempt to keep CLECs out of its market. (Tr. 29.) Defendants have challenged in the courts the Act's requirements that they provide their services to CLECs at wholesale prices, as well as the FCC's implementing regulations, arguing primarily that the methods by which state commissions were to determine the prices at which CLECs would be able to purchase services from ILECs failed to take into account their costs and resulted in "artificially low" prices. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 793 (8th Cir.1997) (cited in Am. Compl. ¶ 36). Thus, the ILECs have argued that they were being forced to subsidize CLECs' entry into their markets. *Id.* Given their view of the pricing scheme to which they had to adhere, it would be in each ILEC's individual economic interest to attempt to discourage CLECs from entering the market and to render it difficult for them to survive once they had entered, as well as to challenge the pricing rules themselves. Thus, defendants' parallel action does not naturally give rise to an inference of an agreement, since the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory.

Although conceding that such resistence is the natural course for ILECs, plaintiffs nevertheless contend that defendants needed an agreement to thwart CLECs' efforts because it was in their collective interest to ensure that all four ILECs would not allow any CLECs into their markets. Thus, they claim, defendants had two common motives to conspire to ensure that they all acted in the same ways. First, any CLEC that succeeded in one ILEC's territory would be more likely to "present a competitive threat" in other ILECs' territories. Second, if a CLEC were to succeed in one territory, it would prove that CLECs could be successful in other places if the other ILECs were not attempting to thwart them. (Am.Compl.¶ 50.) These are essentially arguments that, even if it was in each ILEC's interest to keep CLECs out, the ILECs collectively had reason to ensure that no CLEC anywhere could succeed, presumably in order to prove to Congress that its intended system of competition was impracticable. (Tr. 29.)

This theory does not posit any motivation independent of defendants' individual economic interests, however. Given that each ILEC has reason to want to avoid dealing with CLECs and having to "subsidize" their entry into the market, each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs. The asserted motivations to make an agreement – the possibility that CLECs that make inroads in other ILECs' territories might want to compete in, for instance, Verizon's market, or that CLECs' success in other markets might suggest that Verizon was engaging in illegal efforts to thwart the CLECs in its own market – are not considerations that would affect Verizon's initial decision as to whether or not to fight the CLECs in its own market. That decision would be based, as plaintiffs' allegations suggest (Am.Compl.¶¶ 39, 47), only on its economic interest in maintaining its own market power, and since the ILECs are similar firms with similar information and interests, they could rationally expect that each of them will reach the same conclusions as to the course of action that best suits their interests.

whether or not an agreement exists. *Kramer*, 890 F.Supp. at 255-56. No agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained from parallel action. Plaintiffs suggest no reason whatever to believe that any of the defendants, absent an agreement with the others, would have had any reason to adopt a policy of welcoming CLECs into its territory. Thus, the motives that plaintiffs have proffered do not provide any basis to infer that defendants' conduct was the result of anything but their individual economic interests.

B. *Conspiracy Not To Compete As CLECs*

Plaintiffs' second theory, that defendants refrained from entering each other's markets as CLECs, presents a closer question. Plaintiffs have alleged that, for each defendant, becoming a CLEC in another ILEC's territory would be an attractive business opportunity because, as the ILECs themselves have complained, CLECs hurt ILECs by buying their services and network elements at low rates. (Am.Compl.¶¶ 39, 40.) Competing as CLECs, plaintiffs claim, would also be feasible in light of the fact that, due to mergers, each ILEC controls some territory that is completely surrounded by another ILEC's territory. For instance, SBC controls Connecticut, but Verizon controls the rest of the Northeast, so it should be an attractive proposition for Verizon to become a CLEC in Connecticut. (*Id.* ¶ 40.) In addition, plaintiffs allege that Richard Notebaert, CEO of Qwest, stated that competing as a CLEC "might be a good way to turn a quick dollar but that doesn't make it right." (*Id.* ¶ 42.) According to plaintiffs, his statement suggests that moving into other ILECs' markets as a CLEC would be in Qwest's economic interest, especially since Qwest was experiencing financial difficulties at the time (*id.* ¶ 43), but that such conduct would not be "right" because of the ILECs' agreement not to compete with each other. Plaintiffs' basic theory, therefore, is that refraining from competing as CLECs was against the economic interests of each of the defendants, absent the assurance that each defendant would retain complete market power in its territory because

none of the other defendants would attempt to become CLECs in other markets. In light of the structure of the market as evidenced by the allegations in the Amended Complaint and the provisions of the 1996 Act, however, it is apparent that this conduct is also attributable to defendants' individual economic interests, and therefore does not raise an inference of conspiracy.

Plaintiffs' theory reflects a number of assumptions about the nature of the market in which CLECs operate, and the relationship between being an ILEC and being a CLEC. Most fundamentally, plaintiffs assume that moving into other markets as CLECs would be in ILECs' individual economic interests. This would be the case only if it appears to be profitable to do so; in other words, if the financial outlay involved in becoming a CLEC is expected to be outweighed by the profits to be gained. Plaintiffs also assume that ILECs' geographic proximity to certain other territories, as well as the ILECs' economic power, would give them "substantial competitive advantages" that would warrant their entering the market. (*Id.* ¶¶ 40-41, 43.) Plaintiffs' theory also presumes that economic damage to ILECs as a result of § 251's requirements is equivalent to financial success on the part of CLECs. (*Id.* ¶ 39.) Essentially, the logic of plaintiffs' complaint is that the failure of one telephone company to attempt to enter the adjacent territory of another telephone company can only (or at least most logically) be explained by a classic conspiracy to divide territories.

Plaintiffs' assumptions are severely undermined, however, by the fact that being a CLEC in another ILEC's territory is an entirely different business than being an ILEC. An ILEC controls and maintains the telecommunications infrastructure in its territory, offering customers a variety of types of access to that network, such as "voice, fax, or analog modem calls from a residence or business." (Am.Compl.¶ 3.) Thus, ILECs are self-sufficient businesses: they offer services directly to end users at prices that presumably cover their operating costs. Because the nature of telecommunications net-

works is such that for a competitor to build a duplicate infrastructure in a particular territory would be prohibitively expensive and create precisely the inefficiencies that telecommunications regulation has always sought to avoid. § 251 conceives of CLECs as working on a different business model. CLECs do not maintain their own infrastructure,[1] instead "obtain[ing] access to an incumbent's network." *Iowa Utils. Bd.*, 525 U.S. at 371-72, 119 S.Ct. 721. Thus, a CLEC's business is completely dependent on its relationship with the local ILEC. CLECs are essentially middlemen, buying network time from ILECs at wholesale prices, repackaging it, and selling it for a profit. The extent to which they must depend on the relevant ILEC is demonstrated by plaintiffs' allegations as to the ILECs' wrongdoing with respect to CLECs, including that "[d]efendants [ILECs] have failed to provide the same quality of service to [CLECs] that [they] provided to their own retail customers," and "have failed to provide access to their operational support systems . . . on a nondiscriminatory basis that places competitors at parity." (Am.Compl.¶ 47.) Thus, the extent to which competing as a CLEC is profitable will depend in substantial part on the terms that can be negotiated with the ILEC, whether the relationship is successful or dispute-ridden, and whether the ILEC fulfills its obligations under § 251.

The difference between being a CLEC and being an ILEC has several implications. First, ILECs who attempt to become CLECs in another ILEC's territory have little competitive advantage over other CLECs. Presumably, the main advantages an ILEC would have over other CLECs in attempting to enter another ILEC's territory as a CLEC are the ILEC's existing

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[1] While CLECs may have their own networks, in the way that long-distance carriers have their own networks that allow them to direct calls, CLECs do not possess the physical infrastructure that allows end users to connect to the exchange networks. (Am.Compl.¶ 47(*l*).) *See also Trinko*, 305 F.3d at 94.

infrastructure and its greater ability to invest in new ventures.[4] (Am. Compl. ¶ 23 (discussing ILECs' market power)). Yet an ILEC's market power in its home territory does not translate into market power as a CLEC in another ILEC's territory. An ILEC's infrastructure would not be of great assistance in its entry into a new territory as a CLEC, because § 251 is premised on the assumption that it would be impossible for other companies to compete with ILECs to provide services directly to users. In buying and re-selling these services from the relevant ILEC, ILECs acting as CLECs are in much the same position as other, smaller, CLECs. Thus, the investment involved in becoming a CLEC is the same for Verizon and SBC as it would be for smaller CLECs; all CLECs would have to invest enough in purchasing services from the ILEC to render reselling them profitable. Moreover, while well-known CLECs and ILECs acting as CLECs possess intangible assets such as name recognition and goodwill, these provide competitive advantages only with respect to consumers; because so much of the CLEC's operation is predicated on its relationship with the ILEC, the CLEC cannot easily leverage these assets into its own independent market power. Because of CLECs' necessary dependence on ILECs, an ILEC acting as a CLEC is in substantially the same position, and must undertake the same economic calculus, as any other CLEC.

Second, for much the same reasons, it is not clear that geographical proximity, or the degree to which a territory is surrounded by another ILEC's territory, provides the competitive advantage to an ILEC acting as a CLEC that plaintiffs assume. Since being a CLEC is a different business than being an ILEC, expanding into a new area is not simply a question of expanding one's infrastructure, or using the existing infra-

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[4] Of course, this may not always be the case, since other CLECs include AT & T, MCI, and Sprint, long-distance companies that have established capital and, presumably, the ability to invest it. *See Trinko*, 305 F.3d at 94 (discussing AT & T's fight to become a CLEC in Verizon's territory).

structure to provide the same services in a new location. Thus, a CLEC moving into a new telecommunications territory is unlike, for instance, an ice cream seller moving into a new territory, because an ILEC's ability to sell services as a CLEC in the new territory is not necessarily enhanced by the proximity of its infrastructure. The purchase and resale structure created by § 251 is necessary precisely because it is impossible, and undesirable, for would-be competitors simply to set up their own infrastructure in a new territory and begin directly selling services to users. Even if taking advantage of the option of interconnecting with elements of the ILEC's network may be somewhat easier for a neighboring ILEC acting as a CLEC, the CLEC is still dependent on its relationship with the ILEC for survival; the ILEC-as-CLEC cannot leverage geographical proximity into independence, and therefore is not materially different from a CLEC without a nearby territory of its own.

Because the ILEC-as-CLEC is no different from any other CLEC with respect to its entry into new markets, the question of whether becoming a CLEC is in an ILEC's economic interest must be answered by determining whether competing as a CLEC is, as a general matter, a profitable endeavor. According to plaintiffs themselves, being a CLEC is an extraordinarily difficult enterprise. Plaintiffs assert that ILECs have been obstructionist is providing CLECs with the tools necessary to engage in business: they have sold low quality services to CLECs (*id.* ¶ 47(a)); discriminated in providing access to their operational support systems (*id.* ¶ 47(b)); created "undue delays" in providing unbundled network elements (*id.* ¶ 47(c)); provided low quality interconnection between their networks and the CLECs' (*id.* ¶ 47(e)); and "refused to allow [CLECs] to connect to essential facilities," including telephone lines and switching stations (*id.* ¶ 47(h)). ILECs have also made CLECs' necessary interactions with them extremely difficult, by "impos[ing] slow and inaccurate manual order processing" of CLECs' orders (*id.* ¶ 47(j)), and using "error filled methods to bill [CLECs] in order to discourage competition by

making it virtually impossible for [CLECs] to audit the bills the receive[]" from the ILECs' (*id.* ¶ 47(i)). Finally, ILECs have allegedly "severely impacted [CLECs'] relationships with customers" by continuing to bill those who switch to CLECs from ILECs' service (*id.* ¶ 47(d)), thereby eroding whatever goodwill a CLEC may have possessed when it entered the market.

According to plaintiffs' own allegations, therefore, it is quite difficult to enter the market as a CLEC, and harder still to make a profit in the face of determined resistance from the ILEC. While plaintiffs assume that, because ILECs have complained that the pricing structure created by the 1996 Act forces them to subsidize CLECs, to their financial disadvantage, ILECs should view becoming CLECs in others' markets as a lucrative opportunity (*id.* ¶ 39), aspects of the regulatory scheme that allegedly have a harmful effect on ILECs do not necessarily translate into easy success for CLECs. Plaintiffs' own factual allegations, which must be accepted as true for purposes of this motion, establish that ILECs have successfully impeded CLECs' using § 251 to create viable business opportunities. Thus, plaintiffs themselves refute their theory that becoming a CLEC is an obviously profitable opportunity for an ILEC.

There is therefore no basis to believe that ILECs would perceive becoming a CLEC as in their economic interests. Plaintiffs' allegations raise the inference that each ILEC is well aware that becoming a CLEC in another market would be extremely difficult in the face of opposition from the local ILEC, because it is using the same tactics against CLECs in its market. Given that each ILEC possesses monopolistic market power in its own territory (*id.* ¶ 47(k)), there is no apparent reason for an ILEC to attempt to push out of its own territory and brave the barriers thrown up by other ILECs. This is especially the case since, as plaintiffs allege, ILECs have been largely successful in keeping CLECs from building viable businesses (*id.* ¶ 47; Pls. Mem. at 2), thus discouraging ILECs, particularly those such as Qwest that are suffering fi-

nancial difficulties (Am.Compl.¶ 43), from wanting to invest much-needed capital in a venture that is likely to fail. Moreover, ILECs have no reason to become CLECs in order to hurt other ILECs by forcing them to sell services at the assertedly confiscatory prices, because the ILECs do not compete with each other in the local telephone services market. (*Id.* ¶ 23.) Thus, Verizon, for example, would have no incentive to spend money simply to wreak economic damage on SBC or the other ILECs.

The statements of Qwest CEO Richard Notebaert, quoted in the Amended Complaint, are not to the contrary. Plaintiffs assert that Notebaert's comment that becoming a CLEC in another ILEC's territory "might be a good way to turn a quick dollar but that doesn't make it right" (*id.* ¶ 42) establishes that not competing as CLECs was contrary to defendants' economic interests. (Pl. Mem. at 9-10.) The Court may consider the entirety of the newspaper article from which plaintiffs drew Notebaert's comment, as well as related articles quoted in the Amended Complaint, because plaintiffs have notice of the documents and have relied on them as evidence of defendants' wrongdoing in bringing suit. Cortec *Industries, Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47-48 (2d Cir.1991).[5] Considered in context, Notebaert's statements suggest only that he did not consider becoming a CLEC to be a sound long-term business plan, because all of the ILECs were challenging § 251 and its pricing structure through litigation, and the legal landscape in which CLECs operate could have changed at any time. (Bradbury Dec. Exs. D, E.) Since prioritizing long-term over short-term economic interest is well within a company's range of rational choices that do not raise suspicions of conspiracy, Notebaert's statements do not support plaintiffs' theory.

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[5] Moreover, defendants have attached the full text of the cited articles to their motion papers (Bradbury Dec. Exs. D-F), and plaintiffs have not objected.

Plaintiffs have therefore not alleged facts that suggesting that refraining from competing in other territories as CLECs was contrary to defendants' apparent economic interests, and consequently have not raised an inference that their actions were the result of a conspiracy. For an ILEC to compete as a CLEC in an adjoining ILEC's territory would not be simply to extend their existing business into a neighboring region, but rather would be to invest in undertaking an entirely different kind of business. Given the obstacles to becoming a successful CLEC, defendants' uncontested market power in their own territories, the fact that being a CLEC is a different business model from being an ILEC, defendants' reluctance to branch out into the CLEC market is perfectly consistent with independent decisions that their economic interests were better served by concentrating on their traditional businesses as ILECs, or, for that matter, investing in entirely different enterprises. It is no more surprising, and raises no more inference of concerted action, that the ILECs have not gone into business as CLECs than that they have all collectively failed to enter some other line of business.

Plaintiffs also have not sufficiently alleged that defendants had a strong common motive to conspire. *Apex Oil*, 822 F.2d at 254. Although the Amended Complaint does not explicitly delineate a motive for defendants' alleged territorial allocation agreement, the motive inherent in such an agreement would be that each conspirator would reap greater profits from its respective territory, free of competition, in return for staying out of other territories. Defendants would have no need to agree to collectively refrain from entering each other's territories, however. Since doing so is not simply a matter of expanding an existing infrastructure and business, and entering as a CLEC is allegedly prohibitively difficult, it would be natural for defendants to refrain from competing with each other on their own. Moreover, ILECs have no great incentive to agree to keep each other from threatening their market control in their respective territories, since, as plaintiffs assert (Am.Compl.¶ 47), each ILEC has been successful in thwart-

ing the CLECs in its market, and has no reason to believe that it would be incapable of thwarting other ILECs acting as CLECs as well. Without some motivation that would make conspiring to reach a result far more effective or profitable than allowing natural self-interest to persuade each ILEC independently to reach the same decision, there is no reason to infer a conspiracy. *See Ambook Enter. v. Time Inc.*, 612 F.2d 604, 616 (2d Cir.1979).

The allegations of plaintiffs' complaint provide no reason to believe that defendants' parallel conduct was reflective of any agreement. The complaint therefore alleges nothing more than parallel conduct that appears to accord with the individual economic interests of the alleged conspirators. Accordingly, plaintiffs have not adequately alleged that defendants violated § 1 of the Sherman Act.[6]

CONCLUSION

Defendants' motion to dismiss the Complaint is granted. Defendant BellSouth's motion to dismiss for lack of personal jurisdiction is consequently denied as moot.

SO ORDERED.

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[6] It is therefore unnecessary to reach defendants' argument that the plaintiffs' damages claims are barred by the filed rate doctrine, or BellSouth's objection to personal jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	1/3/06
Docket Number:	03-9213-cv
Short Title:	Twombly v. Bell Atlantic Corp.
DC Docket Number:	02-cv-1022
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Gerard Lynch

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of January two thousand six.

WILLIAM TWOMBLY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
AND LAWRENCE MARCUS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL, INC., SBC COMMUNICATIONS INC. AND VERIZON COMMUNICATIONS INC.,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Bell Atlantic Corporation, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court:
Roseann B. MacKechnie, Clerk
By: /s/ ARTHUR M. HELLER
Motion Staff Attorney

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.